

No. 6873

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

JAMES McCULLOCH, JR.,

Appellant,

vs.

THE PENN MUTUAL LIFE INSURANCE  
COMPANY OF PHILADELPHIA,  
a corporation,

Appellee.

Transcript of Record.

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Upon Appeal from the United States District Court for the Southern  
District of California, Southern Division.

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FILED

JUN 17 1932

PAUL P. O'BRIEN,  
CLERK



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Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

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For Defendant and Appellee:

O'MELVENY, TULLER & MYERS, Esqs.,  
J. R. GIRLING, Esq.,  
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Los Angeles, California.

IN THE UNITED STATES DISTRICT COURT  
 IN AND FOR THE SOUTHERN DISTRICT OF  
 CALIFORNIA SOUTHERN DIVISION

JAMES McCULLOCH, JR., ) No. A-5-M-Eq.

Plaintiff, )

-vs-

) CITATION ON  
 APPEAL

PENN MUTUAL LIFE INSUR- )  
 ANCE COMPANY OF PHILA- )  
 DELPHIA, a corporation, )

Defendant. )

---

UNITED STATES OF )  
 AMERICA ) ss.

TO THE PENN MUTUAL LIFE INSURANCE  
 COMPANY OF PHILADELPHIA, A CORPO-  
 RATION; AND TO MESSRS. O'MELVENY,  
 TULLER & MYERS, J. R. GIRLING AND  
 STEARNS, LUCE & FORWARD, ITS ATTOR-  
 NEYS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Southern District of California, Southern Division, in a suit wherein James McCulloch, Jr. is appellant and you are appellee, to show cause, if any there be, why the judgment and order rendered against said James McCulloch, Jr. should not be

corrected and why speedy justice should not be done to the parties on that behalf.

DATED: SAN FRANCISCO, CALIFORNIA

December 28, 1931.

Curtis D. Wilbur

Judge of the Circuit Court for the  
9th Circuit

Service of a copy of the foregoing citation is acknowledged this 4th day of January, 1932.

O'Melveny, Tuller & Myers.

M. A. T.

Attorneys for defendant.

[Endorsed]: Filed Jan. 4-1932. R. S. Zimmerman, Clerk, by C. A. Simmons, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

No A-5-M

-----  
JAMES McCULLOCH, JR.,

Plaintiff

- vs -

THE PENN MUTUAL  
LIFE INSURANCE COM-  
PANY OF PHILADEL-  
PHIA, a Corporation.

Defendant

:  
:  
: COMPLAINT TO DE-  
: CLARE POLICIES OF  
: INSURANCE IN FORCE  
: AND FOR RECOVERY  
: OF BENEFITS THERE-  
: UNDER.  
:  
:

-----  
Plaintiff, complaining of the defendant, complains and alleges:

## 1.

That the defendant, THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, is now, and at the times hereinafter mentioned, was, a Corporation, duly organized, created and existing under and by virtue of the laws of the State of Pennsylvania, authorized and empowered to do business in the State of California, and having an office and general agent in the City of San Diego, State of California.

## 2.

That on or about the 14th. day of October, 1925, at the City of San Diego, County of San Diego, State of California, in consideration of the payment by plaintiff to the defendant of the annual premium of Two Hundred and Seventy Five and 60/100 (\$275.60) Dollars, defendant made and delivered to plaintiff its policy of insurance, in writing, agreeing to pay the beneficiary named in said policy of insurance the sum of Ten Thousand Dollars (\$10.000) upon the death of plaintiff.

## 3.

That in and by said policy of insurance aforesaid, same being numbered 1191014, it was further agreed and provided that should the plaintiff become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the defendant, Corporation, agreed to pay to plaintiff a monthly income of one per cent. (1%) of the face of the policy, to-wit: the sum of \$100.00 per month, from the beginning of such total and permanent disability, as aforesaid, and in and by said policy of insurance aforesaid, further agreeing, in the event of such total and permanent disability of the plaintiff, to continue said policy of insur-



ance in force and waive the payment of all further premiums thereon during the continuance of such total and permanent disability, as aforesaid.

## 4.

Plaintiff alleges that in and by said policy of insurance, and the provisions thereof, and in consideration of the payment of the premium therefor, as above stated, he was insured in defendant Corporation for said sum of Ten Thousand (\$10,000) Dollars, and entitled to all the benefits therein mentioned and provided for a period of one year, plus grace period, from October 14, 1925. That before the next policy anniversary, and before the sixtieth anniversary of the age of the insured, and on July 31, 1926, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit: Pulmonary Tuberculosis, and was confined to his bed for a period of nine weeks from said last mentioned date, and was confined to his home from said time to about April 9, 1927, when plaintiff was again confined to his bed and was compelled to remain therein from said last mentioned date to the latter part of August, 1927, and in consequence of said illness and disease, plaintiff became, was, and is permanently and totally disabled from engaging in any occupation whatsoever for remuneration or profit. That said disease, independently from all other causes, and within the terms of said insurance, has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from said July 31, 1926, continuing to date hereof, and as plaintiff is informed and believes, such incapacity, due to said illness and disease aforesaid, will continue for an indefinite period in future.

## 5.

That on November 14, 1926, plaintiff made, executed and delivered to the defendant his certain promissory note in the sum of \$275.60, the same bearing interest at the rate of six per cent. per annum, in payment of the premium due on said policy of insurance on October 14, 1926, said promissory note being accepted by said defendant Corporation in payment of said premium aforesaid, and, as plaintiff is informed and believes, continued said policy of insurance, and the benefits thereunder, in force, to October 14, 1927, and the grace period thereafter. That the due date of said promissory note was February 14, 1927. That at said time plaintiff was further insured in defendant Corporation in the sum of \$20.000, represented by two certain policies of insurance issued to plaintiff by defendant Corporation, and at or about said time, plaintiff, in payment of the premiums on said two last mentioned policies of insurance made and delivered, at the request of defendant said agent in the City of San Diego, California, a post-dated check in the sum of \$300.00. That shortly after the dated mentioned in said check, as its due date, plaintiff being unable to meet the payment thereof, the general agent of defendant Corporation in the City of San Diego, California, threatened the plaintiff with criminal prosecution for the issuance and non-payment of said check, and delivered said check over to the District Attorney of the County of San Diego, California, for criminal action and prosecution thereon. That the plaintiff, because of his said illness and disease aforesaid, and being unable to follow or engage in any occupation for remuneration or profit, was unable to pay said promissory note, dated November 14, 1926, and being

unable by virtue of said illness and disease to engaged in or follow any occupation for remuneration or profit, to meet the payment of said post-dated check, on the day on which same became due and payable, the defendant Corporation by and through its general agent and representative in the City of San Diego, California, wrongfully and fraudulently demanded the return and surrender of said policies of insurance, heretofore mentioned, including policy of insurance No. 1191014, and threatened plaintiff with further criminal prosecution should he fail or refuse to so surrender said policies of insurance to the defendant Corporation. That plaintiff, being extremely ill and suffering with said disease aforesaid, and believing that he would be criminally prosecuted should he fail or refuse to surrender said policies of insurance to said defendant Corporation, and laboring under said duress and bodily illness, and without knowledge or information as to his rights under said policy of insurance, No. 1191014, or the other two said policies, aforesaid or the benefits which would accrue to him under said policy of insurance, and because of said threats, duress and illness, as aforesaid, surrendered and delivered said policy of insurance, No. 1191014 to defendant's said agent, as aforesaid, on or about March 8, 1927.

## 6.

That plaintiff had been informed by the physicians who were in attendance upon him during his said illness aforesaid, that the nature of the illness and disease with which he was then suffering was Pneumonia and *Pluresy* with Effusions, and plaintiff continued in said belief, as he was so advised by his said physicians, aforesaid, to on or about July 6, 1927, and was not aware of his true condi-

tion, or the true and exact nature of his said illness and disease, or that he at that time, or had been theretofore suffering with Pulmonary Tuberculosis, or that he had been, or would be totally and permanently disabled from engaging in any occupation for remuneration or profit, until or about said July 6, 1927, when, upon being examined by a physician, other than the ones in attendance upon him, he was then informed for the first time that his disease was Pulmonary Tuberculosis, and not Pneumonia or *Pluresy* with Effusions, as he was theretofore led to believe, and that he was stricken with said Pulmonary Tuberculosis on said July 31, 1926, the date of his first confinement to his bed as aforesaid.

That at said time, because of the fraud and duress practiced upon plaintiff by the defendant's said agent and representative as aforesaid, and as is specifically mentioned and referred to in paragraph marked (5) herein, plaintiff not being in possession of said policy of insurance, and being in complete ignorance of the disability features therein mentioned and contained, or that he was entitled to disability benefits thereunder, and was in complete ignorance of, and unaware of the requirements of said policy of insurance relative to Notices and Proofs to be furnished the defendant Corporation in the event of total or permanent disability of the plaintiff as aforesaid. Plaintiff alleges that he did not become aware of the requirements in said policy of insurance relative to Notices and Proofs to the defendant Corporation, in the event of total and permanent disability of the plaintiff, nor was he aware the *the* disease and illness with which he was then suffering was such a disability as was covered by said policy of insurance and would enable plaintiff to be

entitled to the benefits mentioned and recited in said policy of insurance, until on or about April 10, 1929, when, in response to plaintiff's request the defendant Corporation forwarded to plaintiff a copy of said policy of insurance aforesaid.

## 7.

That upon the discovery by plaintiff that said policy of insurance was in force and was effective at the time of his said illness, as aforesaid, as plaintiff is informed and believes, plaintiff requested claim blanks of said defendant Corporation for the purpose of filing his said claim for total and permanent disability suffered by plaintiff, and cause the payment to him of the disability benefits mentioned and recited in said policy of insurance, from the date of his said disability, to-wit: July 31, 1926, to date thereof, and thereafter during the period of his total and permanent disability, as aforesaid, but defendant Corporation refused to permit plaintiff to file such claim for said disability aforesaid, and failed and refused to pay plaintiff the disability benefits thereing mentioned and recited, to-wit: the sum of One Hundred (\$100.00) Dollars per month from July 31, 1926 as aforesaid, and thereafter during the period of his total and permanent disability, as aforesaid, and has failed and refused to pay plaintiff any sum or sums whatsoever on account of same.

## 8.

That plaintiff has duly performed all the conditions of said policy of insurance on his part to be performed, and defendant Corporation has paid no part of said sum designated as disability benefits under said policy of insurance No. 1191014, and there is now due, owing, and unpaid by the defendant Corporation to the plaintiff the sum of



THIRTY SEVEN HUNDRED (\$3700.00) DOLLARS, together with interest thereon, as of September 1, 1929, and thereafter at the rate of ONE HUNDRED (\$100.00) DOLLARS per month during the period of plaintiff's said disability, as aforesaid.

AND FOR A FURTHER AND SECOND CAUSE OF ACTION, Plaintiff alleges:

9.

Plaintiff hereby adopts the allegations contained in paragraph marked (1) of his First Cause of Action herein, and refers to same and makes same a part of this his Second Cause of Action, as fully as is the same were set forth in full herein.

10.

That on or about the 27th. day of November, A. D. 1925, at the City of San Diego, County of San Diego, State of California, the plaintiff made, executed and delivered to the defendant Corporation his certain promissory note in the sum of FIVE HUNDRED AND FIFTY ONE and 20/100 (\$551.20) DOLLARS, bearing interest at the rate of six per cent. per annum, in payment by plaintiff to the defendant of the annual premium of \$413.40, in consideration of which the defendant made and delivered to the plaintiff its policy of insurance, in writing, agreeing to pay the beneficiary named in said policy of insurance the sum of FIFTEEN THOUSAND (\$15,000) DOLLARS upon the death of plaintiff.

11.

That in and by said policy of insurance, same being numbered 1196774, it was further agreed and provided that should the plaintiff become totally and permanently

disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the defendant Corporation, agreed to pay to the plaintiff a monthly income of one per cent (1%) of the face of the policy, to-wit: the sum of One Hundred and Fifty (\$150.00) Dollars per month, from the beginning of such total and permanent disability, as aforesaid, and in and by said policy of insurance aforesaid, further agreeing in the event of such total and permanent disability to the plaintiff to continue said policy of insurance in force and waive the payment of all further premiums thereon during the continuance of such total and permanent disability, as aforesaid.

## 12.

Plaintiff alleges that in and by said policy of insurance, and the provisions thereof, and in consideration of the making and executing by plaintiff of said promissory note, as aforesaid, and the acceptance of same by the defendant Corporation, he was insured in defendant Corporation for said sum of Fifteen Thousand Dollars, and entitled to all the benefits therein mentioned and provided for a period of one year, plus 31 days grace period, from November 27th, 1925. That before the next policy anniversary and before the sixtieth anniversary of the age of the insured, and on July 31, 1926, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit: Pulmonary Tuberculosis, and was confined to his bed for a period of nine weeks from said last mentioned date, and was confined to his home from said time to about April 9, 1927, when plaintiff was again confined to his bed and was compelled to remain therein from said last mentioned date to the latter part of August, 1927, and in consequence of

said illness and disease, plaintiff became, was, and is permanently and totally disabled from engaging in any occupation whatsoever for remuneration or profit. That said disease, independently from all other causes, and within the terms of said contract of insurance, has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from said July 31, 1926, continuing to date hereof, and, as plaintiff is informed and believes, such incapacity, due to said illness and disease aforesaid, will continue for an indefinite period in the future.

## 13.

That the plaintiff, because of said illness and disease aforesaid, being unable to follow or engage in any occupation for remuneration or profit, was unable to pay said promissory note, dated November 25, 1925; that on innumerable occasions between November 25, 1926 and December 30th, 1926, defendant's said agent and representative called plaintiff by 'phone and visited him at his home, while plaintiff was confined to his home and his bed with said illness and disease, and insisted upon the payment of the note or the return and surrender to said agent of said policy of insurance. That said calls by said agent and representative were constant and continuous during said period, and his strenuous insistence upon payment or the return of the policy of insurance was a source of great annoyance and harassment to plaintiff, as well as worry, and caused his condition to become more serious and dangerous, against worry and annoyance he was advised by his physicians in attendance to refrain, and to rid himself of the constant and repeated calls and demands of defendant's said agent and representative for the



return of said policy of insurance, and the annoyance, harassment and worry incident thereto, plaintiff, at the strenuous insistence of defendant's said agent and representative, and for the purpose of securing relief from him, surrendered said policy of insurance to said defendant's said agent and representative aforesaid. That at the time of such surrender of said policy of insurance, as aforesaid, defendant Corporation, and Defendant's said agent and representative, well knew that plaintiff was suffering with Pulmonary Tuberculosis, and well knew that plaintiff was covered and protected by said policy of insurance, and was, and would be entitled to the benefits therein mentioned and provided, fraudulently, and for the purpose of deceiving the plaintiff, and fraudulently depriving, or attempting to deprive plaintiff of his said rights under said policy of insurance, advised plaintiff that his said policy of insurance had lapsed and he was no longer insured by virtue thereof, or entitled to the benefits therein recited, thus fraudulently and wrongfully procured the release and surrender of said policy of insurance to the defendant. The plaintiff at said time, and for a long time thereafter, was ignorant of the true nature of his disease, and was not aware of the fact that he was suffering with Pulmonary Tuberculosis, though this fact was well known to the defendant Corporation, and its said agent and representative aforesaid, at said time.

## 14.

That plaintiff had been informed by the physicians who were in attendance upon him during his said illness aforesaid, that the nature of the illness and disease with which he was then suffering was Pneumonia and *Pluresy* with Effusions, and plaintiff continued in said belief, as he

was so advised by his said physicians, aforesaid, to on or about July 6, 1927, and was not aware of his true condition, or the true and exact nature of his said illness and disease, or that he at that time, or had been theretofore, suffering with Pulmonary Tuberculosis, or that he had been, or would be totally and permanently disabled from engaging in any occupation for remuneration or profit, until on or about said July 6, 1927, when, upon being examined by a physician other than the ones in attendance upon him, he was then informed for the first time that his disease was Pulmonary Tuberculosis, and not Pneumonia or *Pluresy* with Effusions, as he was theretofore led to believe and that he was stricken with said Pulmonary Tuberculosis on said July 31, 1926, the date of his first confinement to his bed, as aforesaid.

That at said time, because of the fraud and duress practiced upon the plaintiff by the defendant's said agent and representative, as aforesaid, and as is specifically mentioned and referred to in paragraph marked (13) herein, plaintiff not being in possession of said policy of insurance, and being in complete ignorance of the disability features therein mentioned and contained or that he was entitled to disability benefits thereunder, and was in complete ignorance of, and unaware of the requirements of said policy of insurance relative to Notices and Proofs to be furnished defendant Corporation in the event of total and permanent disability of the plaintiff as aforesaid. Plaintiff alleges that he did not become aware of the requirements of said policy of insurance relative to Notices and Proofs to the defendant Corporation, in the event of total and permanent disability of the plaintiff, nor was he aware that the disease and illness with which

he was then suffering was such a disability as was covered by said policy of insurance and would enable plaintiff to be entitled to the benefits mentioned and recited in said policy of insurance, until on or about April 10, 1929, when, in response to the plaintiff's request the defendant Corporation forwarded to plaintiff a copy of said policy of insurance aforesaid.

## 15.

That upon the discovery by plaintiff that said policy of insurance was in full force and effect at the time of his said illness, as aforesaid, as plaintiff is informed and believes, plaintiff requested claim blanks of said defendant Corporation for the purpose of filing his said claim for total and permanent disability suffered by plaintiff, and cause the payment to him of the disability benefits mentioned and recited in said policy of insurance from the date of his disability, to-wit: July 31, 1926, to the date thereof, and thereafter during the period of his total and permanent disability, as aforesaid, but defendant Corporation refused to permit plaintiff to file such claim for said disability aforesaid, and failed and refused to pay plaintiff the disability benefits therein mentioned and recited, to-wit: the sum of ONE HUNDRED and FIFTY (\$150.00) DOLLARS per month, from July 31, 1926, as aforesaid, and thereafter during the period of his total and permanent disability, as aforesaid, and has failed and refused to pay plaintiff any sum, or sums, whatsoever on account of same.

## 16.

That plaintiff has duly performed all of the conditions of said policy of insurance on his part to be performed, and defendant corporation has paid no part of said sum

designated as disability benefits under said policy of insurance No. 1196774, and there is now due, owing, and unpaid by the defendant Corporation to the plaintiff, the sum of FIFTY FIVE HUNDRED AND FIFTY (\$5550.00) DOLLARS, together with interest thereon as of September 1, 1929, and thereafter at the rate of ONE HUNDRED AND FIFTY (\$150.00) DOLLARS per month during the period of plaintiff's said disability as aforesaid.

AND FOR A FURTHER AND THIRD CAUSE OF ACTION, Plaintiff alleges:

17.

Plaintiff hereby adopts the allegations contained in paragraph marked (1) of his First Cause of Action herein, and refers to same, and makes same a part of this his Third Cause of Action, as fully as if the same were set forth in full herein.

18.

That on or about the 27th. day of November, A. D. 1925, at the City of San Diego, County of San Diego, State of California, the plaintiff made, executed and delivered to the defendant Corporation his certain promissory note in the sum of FIVE HUNDRED AND FIFTY ONE and 20/100 (\$551.20) DOLLARS, bearing interest at the rate of six per cent. per annum, in payment by plaintiff to the defendant of the annual premium of \$122.50, in consideration of which defendant made and delivered to the plaintiff its policy of insurance, in writing, agreeing to pay the beneficiary named in said policy of insurance the sum of FIVE THOUSAND (\$5,000) DOLLARS upon the death of plaintiff.

## 19.

That in and by said policy of insurance, same being numbered 1196773, it was further agreed and provided that should the plaintiff become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the defendant Company will waive the payment of any premium thereafter to become due thereon during the continuance of such total and permanent disability as aforesaid.

## 20.

Plaintiff alleges that in and by said policy of insurance, and the provisions thereof, and in consideration of the making and executing by the plaintiff of said promissory note, as aforesaid, and the acceptance of same by the defendant Corporation, he was insured by the defendant Corporation for the said sum of \$5,000, and entitled to all the benefits therein mentioned and provided for a period of one year, plus 31 days grace period, from November 27, 1925. That before the next policy anniversary and before the policy anniversary on which the age of the insured at nearest birthday is sixty years, and on July 31, 1926, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit: Pulmonary Tuberculosis, and was confined to his bed for a period of nine weeks from said last mentioned date, and was confined to his home from said time to about April 9, 1927, when plaintiff was again confined to his bed and was compelled to remain therein from said last mentioned date to the latter part of August, 1927, and in consequence of said illness and disease, plaintiff became was, and is, permanently and totally disabled



from engaging in any occupation whatsoever for remuneration or profit. That said disease, independently from all other causes, and within the terms of said contract of insurance, has resulted in permanent disability wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from said July 31, 1926, continuing to date hereof, and as plaintiff is informed and believes, such incapacity, due to said illness and disease aforesaid, will continue for an indefinite period in the future.

## 21.

That plaintiff, because of said illness and disease aforesaid, being unable to follow or engage in any occupation for remuneration or profit, was unable to pay said promissory note, dated November 25, 1925; that on innumerable occasions between November 25, 1926 and December 30, 1926, defendant's said agent and representative called plaintiff by 'phone and visited him at his home while plaintiff was confined to his home and his bed with said illness and disease, and insisted upon the payment of the note or the return and surrender to said agent of said policy of insurance. That said calls by said agent and representative were constant and continuous during said period, and his strenuous insistence upon payment or the return of the policy of insurance was a source of great annoyance and harassment to plaintiff, as well as worry, and caused his condition to become more serious and dangerous, against worry and annoyance he was advised by his physicians in attendance to refrain, and to rid himself of the constant and repeated calls and demands of defendant's said agent and representative for the return of said policy of insurance, and the annoyance,

harassment and worry incident thereto, plaintiff at the strenuous insistence of defendant's said agent and representative, and for the purpose of securing relief from him, surrendered said policy of insurance to the defendant's said agent and representative aforesaid. That at the time of such surrender of said policy of insurance, as aforesaid, defendant Corporation, and defendant's said agent and representative, well knew that plaintiff was suffering from Pulmonary Tuberculosis, and well knew that plaintiff was covered and protected by said policy of insurance, and was, and would be entitled to the benefits therein mentioned and provided, fraudulently, and for the purpose of deceiving the plaintiff, and fraudulently depriving, or attempting to deprive plaintiff of his said rights under said policy of insurance, advised plaintiff that his said policy of insurance had lapsed, and he was no longer insured by virtue thereof, or entitled to the benefits therein recited, thus fraudulently and wrongfully procured the release and surrender of said policy of insurance to the defendant. That plaintiff, at said time, and for a long time thereafter, was ignorant of the true nature of his disease, and was not aware of the fact that he was suffering from Pulmonary Tuberculosis, though this fact was well known to the defendant Corporation, and its said agent and representative aforesaid, at said time.

## 22.

That plaintiff had been informed by the physicians who had been in attendance upon him during his said illness aforesaid, that the nature of his illness and disease with which he was then suffering was Pneumonia and *Pluresy* with Effusions, and plaintiff continued in said belief, as he was so advised by his said physicians, aforesaid, to

on or about July 6, 1927, and was not aware of his true condition, or the true and exact nature of his said illness and disease, or that he at that time, or had been theretofore, suffering with Pulmonary Tuberculosis, or that he had been or would be totally and permanently disabled from engaging in any occupation for remuneration or profit, until on or about said July 6, 1927, when, upon being examined by a physician, other than the ones in attendance upon him, he was then informed for the first time that his disease was Pulmonary Tuberculosis and not Pneumonia or *Pluresy* with Effusions, as he was theretofore led to believe, and that he was stricken with said Pulmonary Tuberculosis' on said July 31, 1926, the date of his first confinement to his bed, as aforesaid.

That at said time, because of the fraud and duress practiced upon the plaintiff by defendant's agent and representative, as aforesaid, and as is specifically mentioned and referred to in paragraph marked (21) herein, plaintiff not being in possession of said policy of insurance, and being in complete ignorance of the disability features therein mentioned and contained, or that he was entitled to disability benefits thereunder, and was in complete ignorance of, and unaware of the requirements of said policy of insurance relative to Notices and Proofs to be furnished defendant Corporation in the event of total and permanent disability of plaintiff as aforesaid. Plaintiff alleges that he did not become aware of the requirements of said policy of insurance relative to Notices and Proofs to the defendant Corporation, in the event of total and permanent disability of the plaintiff, nor was he aware that the disease and illness with which he was then suffering was such a disability as was covered by said policy



of insurance, and would enable plaintiff to be entitled to the benefits mentioned and recited in said policy of insurance, until on about April 10, 1929, when in response to plaintiff's request the defendant Corporation forwarded to plaintiff a copy of said policy of insurance aforesaid.

23

That upon the discovery by plaintiff that said policy of insurance was in full force and effect at the time of his said illness, as aforesaid, as plaintiff is informed and believes, plaintiff requested claim blanks of said defendant Corporation for the purpose of filing his said claim for total and permanent disability suffered by plaintiff, and cause the waiver of all further and future premiums on said policy of insurance aforesaid during the period of his said total and permanent disability, as aforesaid, but defendant Corporation refused to permit plaintiff to file such claim for said disability benefit aforesaid.

24.

That plaintiff has duly performed all the conditions of said policy of insurance on his part to be performed.

WHEREFORE, plaintiff demands judgment:

1. That the said policies of insurance in the defendant Corporation, and designated as Policies of Insurance Numbered 1191014, 1196774 and 1196773, be declared by this Court to be in full force and effect.

2. That the premiums due on said policies of insurance in the defendant Corporation, and designated as Policies of Insurances numbered 1191014, 1196774 and 1196773 be declared by this Court to be waived from and after July 31, 1926, and until the total and permanent disability of plaintiff shall have been removed.

3. That plaintiff recover of the defendant, THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation, the sum of THIRTY SEVEN HUNDRED (\$3700.00) DOLLARS, together with interest at seven per cent., per annum on installment thereon of \$100.00 per month from July 31, 1926. to September 1, 1929. as provided in Policy of Insurance No. 1191014, in said Defendant Corporation.

4. That plaintiff recover of the defendant, THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation, the sum of ONE HUNDRED DOLLARS (\$100.00) per month, from and after September 1, 1929, and during the continuation of the total and permanent disability of plaintiff, as provided in Policy of Insurance No. 1191014, in said defendant Corporation.

5. That Plaintiff further recover of the defendant, THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Coporation, the further sum of FIFTY FIVE HUNDRED AND FIFTY (\$5550.00) DOLLARS, together with interest thereon at seven per cent. per annum on installments thereon of \$150.00 per month from July 31, 1926, to September 1, 1929, as provided in Policy of Insurance No. 1196774, in said defendant Corporation.

6. That plaintiff further recover of the defendant, THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation, the further sum of ONE HUNDRED and FIFTY (\$150.00) DOLLARS per month, from and after September 1, 1929, and during the continuation of the total and perma-

ment disability of plaintiff, as provided in Policy of Insurance No. 1196774, in said Defendant Corporation.

7. For plaintiffs costs herein expended, and for such other and further relief to which plaintiff may be entitled in the premises.

A. L. Wissburg  
Attorney for Plaintiff,  
541 Spreckels Th. Bldg  
San Diego, Calif.

UNITED STATES OF AMERICA,  
SOUTHERN DISTRICT OF CALIFORNIA  
COUNTY OF SAN DIEGO.

JAMES McCULLOCH, JR., being first duly sworn, deposes and says, that he is the plaintiff in the above entitled action; that he has heard read the foregoing Complaint, and knows the contents thereof, that the same is true of his own knowledge, except those matters therein stated on his information or belief, and as to those matters that he believes it to be true.

James McCulloch, Jr.

Subscribed and sworn to before me this 13 day of September, 1929.

[Seal]

D. M. Houser

Notary Public in and for the County of San Diego,  
State of California,

[Endorsed]: Filed Sep. 16, 1929. R. S. Zimmerman,  
Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ANSWER.

Comes now THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a corporation, the defendant above named, and as answer to plaintiff's bill on file herein admits, alleges and denies as follows:

AS ANSWER TO THE FIRST CAUSE OF ACTION:

-I-

Admits the allegation contained in Paragraph I of said bill.

-II-

Admits the allegations contained in Paragraph II of said bill.

-III-

Admits that in and by said policy of insurance aforesaid, the same being numbered 1191014, it was provided that certain benefits should be paid in the event of the total and permanent disability of the insured; but alleges that paragraph III of plaintiff's bill contains an inaccurate statement of the provisions of the policy for benefits by reason of permanent and total disability of the insured.

Denies that its agreement in and by said policy of insurance was "that should the plaintiff become totally and permanently disabled before the age of the insured at his nearest birthday is sixty years the defendant corporation will pay to the plaintiff a monthly income of one per cent (1%) of the face amount of the policy, to-wit, the sum of \$100.00 per month, from the beginning of such total and permanent disability".

Alleges that in and by the terms of said policy it is agreed that defendant shall pay to the insured a monthly income equal to one per cent (1%) of the face amount of the policy if the insured becomes totally and permanently disabled before the policy anniversary at which his age is sixty (60) years, said income to start upon the date of the receipt by the company at its home office during the insured's lifetime of due proof of total and permanent disability; a true copy of which such policy is hereto annexed marked exhibit "A" and made a part hereof as though set forth in full at this portion of defendant's answer.

Defendant further alleges that it was agreed in and by the terms of the said policy aforesaid that disability benefits for permanent and/or total disability should terminate upon any default in the payment of any premium.

Defendant further denies that its agreement as set forth in the policy was "in the event of such total and permanent disability of the plaintiff to continue said policy of insurance in force and waive the payment of further premiums thereon during the continuance of such total and permanent disability", as alleged in plaintiff's bill; but on the contrary alleges that by the terms of said policy of insurance it agreed to waive payment of any premiums falling due after the receipt of due proof of total and permanent disability and during the continuance of the total and permanent disability of the insured.

-IV-

As answer to Paragraph IV of plaintiff's bill defendant admits that said policy of insurance No. 1191014 was in full force and effect for the period of one year plus the grace period of thirty-one (31) days from October 14,

1925. Defendant denies each and every allegation other than hereinbefore expressly admitted, contained in Paragraph IV of plaintiff's bill.

-V-

As answer to paragraph V of plaintiff's bill, defendant admits that plaintiff executed and delivered to defendant a certain promissory note for Two Hundred Seventy-five and 60/100 Dollars (\$275.60) on November 14, 1926, on account of the premium due October 14, 1926, on said policy of insurance No. 1191014, which said promissory note was due February 14, 1927; but defendant denies that said promissory note, which said note was never paid by plaintiff, constituted payment of the said premium upon said policy of insurance.

Defendant denies that the acceptance of said promissory note by it continued the said policy of insurance and/or the benefits thereunder in force and/or effect to October 14, 1927, and/or the grace period thereafter; and upon the contrary alleges that the giving of said note by the plaintiff and the acceptance of it by defendant was a conditional payment of the said premium, and that the failure of plaintiff to pay said note when due, or at any time thereafter, breached said condition and voided the entire note transaction, thereby causing said policy of insurance to lapse as of October 14, 1926. Defendant admits that on or about November 27, 1925, it had issued two additional policies, numbers 1196773 and 1196774 in the respective amounts of Five Thousand Dollars (\$5,000.00) and Fifteen Thousand Dollars (\$15,000.00), on the life of plaintiff, and that on account of each such policies plaintiff had given defendant promissory notes totalling Five Hundred Fifty-one and 20/100 Dollars



(\$551.20) on account of the first year's premiums and interest. Defendant alleges that plaintiff never made any cash payment on account of any premiums under said two last mentioned policies No. 1196773 and No. 1196774.

Defendant admits that plaintiff delivered to defendant's agent in the City of San Diego, California, a post dated check for Three Hundred Dollars (\$300.00) to be applied on account of his liability under the notes given on account of the premiums under said last mentioned policy, and defendant further alleges that said check was not paid when presented.

Defendant denies that its general agent or anyone, for and on its behalf, threatened plaintiff with criminal prosecution for the issuance and non-payment of said Three Hundred Dollar (\$300.00) check. Defendant denies that its general agent, or any agent, in the City of San Diego, California, delivered said check over to the District Attorney of the County of San Diego, California, for criminal action and/or prosecution thereon.

Defendant denies that from November 14, 1926, to February 14, 1927, the insured, plaintiff herein, was unable, by virtue of his illness to engage in or follow any occupation for remuneration or profit. Defendant further denies that plaintiff was unable to pay said promissory note dated November 14, 1926, and/or make the payment of said post dated check on the day on which same became due and/or payable because of any illness and/or disease alleged in plaintiff's bill, or at all.

Defendant denies that by and/or through its general agent and/or representative in the City of San Diego, it wrongfully and/or fraudulently demanded the return and/or surrender of any policy of insurance issued by it

on plaintiff's life. Defendant further denies that it at any time by or through its general agent and/or representative in the City of San Diego threatened plaintiff with further criminal prosecution, or any prosecution, should he fail to surrender said policies, or any policies of insurance to it.

Defendant further denies that plaintiff surrendered said policy of insurance No. 1191014, or any policies, while laboring under any duress and/or bodily illness; and on the contrary alleges that plaintiff surrendered said policy of insurance No. 1191014 to its agent on March 18, 1927, voluntarily, and over the protest of defendant's agent in the City of San Diego. Defendant further alleges that at the time said policies of insurance were surrendered to it by plaintiff, plaintiff was fully informed as to his rights under said policy and/or policies as to any and all benefits which would accrue to him thereunder.

-VI-

Defendant denies that plaintiff had been informed by the physicians who were in attendance upon him during the illness alleged in plaintiff's bill that the nature of the illness and/or disease with which he was then suffering was pneumonia and pleurisy with effusions. Defendant denies that plaintiff continued in said belief, or any belief, as he was so advised by his said physicians to on or about July 6, 1927, or any other time. Denies that plaintiff was not aware of his true condition and/or the true and/or exact nature of his said illness and/or disease and/or that he at that time or at any time was theretofore suffering with pulmonary tuberculosis and/or that he had been and/or would be totally and/or permanently disabled from engaging in any occupation for remuneration or profit until on or about July 6, 1927.



Defendant denies that at said time as alleged in said paragraph plaintiff was suffering from pulmonary tuberculosis.

Denies that plaintiff upon being examined by a physician other than the ones in attendance upon him was then informed for the first time, or at all, that his disease was pulmonary tuberculosis and not pneumonia and/or pleurisy with effusions, or that theretofore plaintiff had been led to believe that he was suffering with pneumonia and/or pleurisy with effusions. Denies that plaintiff was stricken with said or any pulmonary tuberculosis on July 31, 1926, the date of his first confinement to his bed, as alleged, or at all.

Denies that the failure of plaintiff at any time to have possession of said policy of insurance No. 1191014 was due to any fraud and/or duress practised on plaintiff by defendant or any agent of defendant. Denies that plaintiff was in complete ignorance, or any ignorance, of the terms and/or requirements of said policy of insurance relative to notices and/or proofs to be furnished to defendant in the event of total and permanent disability. Denies that plaintiff did not become aware of the requirements in said policy of insurance relative to notices and proofs in the event of total and permanent disability until on or about April 10, 1929.

-VII-

Defendant admits that it refused to pay plaintiff disability benefits under policy No. 1191014 for the reason that no payments thereunder were due in accordance with the terms and/or provisions of said policy of insurance.

Denies that said policy of insurance was in force and/or was effective at the time of plaintiff's alleged illness as aforesaid, or at all.

Alleges that on March 26, 1929, that being the date upon which the letter of plaintiff constituting his first claim for disability benefits under the provisions of policy No. 1191014 was received by defendant, said policy of insurance No. 1191014 was no longer in force; that said policy of insurance had lapsed for nonpayment of premiums; that plaintiff had theretofore executed a form or surrender of said policy on or about March 18, 1927, and had given up all rights under said policy, in consideration of the return to plaintiff of his unpaid note for \$275.60 hereinbefore referred to, and the release of liability under said note for premiums for any period after said surrender.

Denies that it refused to permit plaintiff to file any claim for disability.

-VIII-

Denies that plaintiff has fully performed, or performed at all, all conditions of said policy of insurance on his part to be performed, and alleges that plaintiff has failed to pay the premiums falling due under the terms of said policy of insurance No. 1191014 upon October 14, 1926, and upon October 14, 1927.

Defendant further alleges that said policy of insurance No. 1191014 lapsed by reason of non-payment by plaintiff of the above premiums.

Denies that there is now due, owing and unpaid by it to plaintiff the sum of Thirty-seven Hundred Dollars (\$3700.00) or any sum whatsoever, with interest thereon as of September 1, 1929, or any other time and/or thereafter at the rate of One Hundred Dollars (\$100.00), or any amount, per month, during the period of plaintiff's disability, as alleged, or at all.

FURTHER ANSWERING THE FIRST CAUSE OF ACTION IN PLAINTIFF'S BILL DEFENDANT moves the court to dismiss said bill of plaintiff and the proceedings herein for all of the reasons hereinbefore set forth; and for the further reasons and upon the grounds that said bill does not state facts sufficient to entitle plaintiff to any relief because

(a) Said bill does not by its face and averments therein contained offer to do equity on the part of plaintiff; and

(b) That the cause of action, if any, sued upon therein is barred by the laches of plaintiff.

AS ANSWER TO THE FURTHER AND SECOND CAUSE OF ACTION SET FORTH IN PLAINTIFF'S BILL DEFENDANT ADMITS, ALLEGES AND DENIES AS FOLLOWS:

-IX-

Admits the allegations contained in Paragraph IX of said bill.

-X-

Admits that on or about November 27, 1925, at the City of San Diego, County of San Diego, State of California, plaintiff made, executed and delivered to defendant his certain promissory note in the sum of Five Hundred Fifty-one and 20/100 Dollars (\$551.20), bearing interest at the rate of 6% per annum, on account, among other things, of the first annual premium under policy No. 1196774 issued by it on plaintiff's life in the sum of Fifteen Thousand Dollars (\$15,000.00); denies that said note was received in payment of said premium.

Defendant alleges that the giving of said note was only conditional payment of the said premium and that the failure of plaintiff to pay said note when due or at any time thereafter breached the condition. Defendant further alleges that it never received any payment in cash or otherwise from or for the benefit of plaintiff on account of the premium upon said policy of insurance No. 1196774.

-XI-

Defendant alleges that its said policy of insurance No. 1196774 contained a provision for certain benefits in the event of total and permanent disability of plaintiff, but alleges that paragraph XI of plaintiff's bill contains an inaccurate statement of the provisions of said policy for benefits by reason of permanent and total disability of the insured, a copy of which said policy, made from original records, is hereto attached marked Exhibit "B" and made a part hereof.

Defendant denies that its agreement was "that should plaintiff become totally and permanently disabled before the age of the insured on his nearest birthday is 60 years the defendant company will pay to the plaintiff a monthly income of 1% of the face of the policy, to-wit, the sum of One Hundred Fifty Dollars (\$150.00) monthly from the beginning of such total and permanent disability", or as alleged in plaintiff's bill; and upon the contrary alleges that in section 4 of said policy, Exhibit "B", it agreed to pay to the insured a monthly income, namely, 1% of the face amount of the policy if the insured became totally and permanently disabled before the policy anniversary on which the insured's age was sixty (60) years, said income to start upon the date of receipt by the company

at its home office, during the insured's lifetime, of due proof of total and permanent disability. Defendant further alleges that it was agreed by the terms of said policy of insurance that all disability benefits should terminate upon default in the payment of any premiums.

Defendant denies that the agreement set forth in the policy was "in the event of such total and permanent disability of the plaintiff to continue such policy of insurance in force and waive the payment of further premiums thereunder during the continuance of such permanent and total disability" as alleged in plaintiff's bill; and upon the contrary alleges that by the terms of said policy, Exhibit "B", it agreed to waive the payment of any premiums falling due after the receipt of due proof of total and permanent disability of the insured and during the continuance of the total and permanent disability of the insured.

-XII-

As answer to Paragraph XII of plaintiff's bill, defendant denies that the giving of the said promissory note and/or the acceptance of the same caused plaintiff to be insured under said policy for a period of one year from November 27, 1925, plus the grace period of 31 days thereafter; and upon the contrary alleges that the giving and acceptance of such note was only conditional payment of the said premium and that the failure of plaintiff to pay said note when due or at any time thereafter breached the condition. Defendant alleges that it never received anything in cash or otherwise on account of said policy of insurance and/or said note.

Denies that before the next policy anniversary and/or before the sixtieth anniversary of the age of the insured and/or on July 31, 1926, plaintiff was taken and/or be-



came ill with a bodily ailment and/or disease, to-wit, pulmonary tuberculosis. Denies that plaintiff was confined to his bed for a period of nine weeks from said last mentioned date and/or was confined to his home from said time to about April 9, 1927, when plaintiff was again confined to his bed and was compelled to remain therein from said last mentioned date to the latter part of August, 1927. Denies that in consequence of said illness and/or disease became, was and/or is permanently and/or totally disabled from engaging in any occupation whatsoever for remuneration or profit.

Denies that said disease, or any disease, independently from all other causes and within the terms of said contract of insurance has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from July 31, 1926, continuing to date hereof. Denies that such incapacity, or any incapacity, due to such illness or any illness and/or disease as alleged by plaintiff, or at all, will continue for an indefinite period, or any period, in the future.

-XIII-

Defendant denies that plaintiff because of illness was unable to follow or engage in any occupation for remuneration or profit. Denies that plaintiff was unable to pay said promissory note dated November 25, 1925. Denies that on innumerable occasions between November 25, 1926 and December 30, 1926, its agent and/or representative called plaintiff by telephone and/or visited him at his home while plaintiff was confined to his home and/or his bed for such illness, or any illness and/or disease, and insisted upon payment of said note or the return

and/or surrender to said agent of said policy of insurance. Denies that said calls by said agent and/or representative were constant and/or continuous during said period. Denies that his, or anyone's strenuous insistence upon the payment and/or return of the policy of insurance was a source of great annoyance and/or harrassment to plaintiff as well as worry and/or caused plaintiff's condition to become more serious and/or dangerous. Denies that plaintiff was advised by his physicians in attendance to refrain from worry and/or annoyance. Denies that to rid himself of the constant and/or repeated calls and/or demands of defendant's said agent and/or representative for the return of said policy of insurance and/or the annoyance, harassment and/or worry incident thereto, plaintiff, at the strenuous insistence, or any insistence of defendant's said agent and/or representative and/or for the purpose of securing relief from him surrendered said policy of insurance to said defendant's said agent and/or representative aforesaid. Defendant admits that on December 30, 1926, plaintiff surrendered said policy of insurance No. 1196774 to defendant's agent, and alleges that such surrender was voluntary on the part of plaintiff and was not caused by worry and/or annoyance brought about by the conduct of defendant or defendant's agents.

Defendant further alleges that said policy of insurance No. 1196774 lapsed for non-payment of premiums on December 28, 1926, two days prior to the date upon which said policy of insurance was surrendered.

Denies that at the time of such surrender, or any surrender, of said policy of insurance as alleged, or at all, it or its said agent and/or representative well knew, or knew at all, that plaintiff was suffering from pulmonary tuber-

culosis. Denies that it or its said agent knew plaintiff was covered and/or protected by said policy of insurance and was and/or would be entitled to the benefits mentioned therein and provided therein. Denies that it fraudulently and for the purpose of deceiving plaintiff and/or fraudulently depriving or attempting to deprive plaintiff of his rights under said policy of insurance, advised plaintiff that said policy of insurance had lapsed and that he was no longer insured by virtue thereof or entitled to the benefits therein recited.

Denies that it fraudulently and/or wrongfully procured the release and/or surrender of such policy of insurance; denies that plaintiff at said time, or any time, and/or for a long time thereafter was ignorant of the true nature, or any nature of his diseases and/or was not aware of the fact that he was suffering with pulmonary tuberculosis and denies that it or its agent and/or representative knew at any time plaintiff was suffering with pulmonary tuberculosis.

-XIV-

As answer to Paragraph XIV of plaintiff's bill defendant denies that plaintiff had been informed by any physician that the nature of the illness and/or disease with which he was then suffering was pneumonia and/or pleurisy with effusions; denies that plaintiff continued in said belief or any belief to on or about July 6, 1927, and was not aware of his true condition and/or the true and/or exact nature of his said illness and/or disease. Denies that plaintiff was ignorant that he at that time and/or theretofore was suffering with pulmonary tuberculosis. Denies that plaintiff had been or would be totally and/or permanently disabled from engaging in any occupation for



remuneration or profit until on or about July 6, 1927, when upon being examined by a physician other than the ones in attendance upon him plaintiff was informed for the first time that his disease was pulmonary tuberculosis and not pneumonia and pleurisy with effusions; denies that plaintiff was stricken with pulmonary tuberculosis upon July 31, 1926, the date of his first confinement to his bed, or any other time.

Denies that the failure of plaintiff at any time to have possession of policy No. 1196774 was due to any fraud and/or duress practised upon plaintiff by defendant or any of its agents. Denies that plaintiff was in complete ignorance of the disability features mentioned and/or contained in said policy of insurance, and/or was unaware of the requirements of said policy of insurance relative to notices and/or proofs to be furnished to defendant corporation in the event of total and/or permanent disability of plaintiff. Denies that plaintiff first became aware of the requirements of said policy of insurance relative to notices and/or proofs on or about April 10, 1929, as alleged in plaintiff's bill, or at all.

-XV-

Defendant denies that policy No. 1196774 was in full force and effect at the time plaintiff requested blanks from defendant for the purpose of filing his claim for total and/or permanent disability upon March 26, 1929, and alleges that long prior thereto the said policy of insurance had lapsed for non-payment of premiums, no cash ever having been paid by plaintiff under said policy, and that because of such non-payment of premiums the provision for disability benefits had automatically terminated in

accordance with the terms of the policy, a true copy of which is hereto attached, marked Exhibit "B".

Defendant admits that it refused to pay to plaintiff disability benefits under said policy No. 1196774, for the reason that no payments thereunder were due under the terms of said policy contract. Defendant alleges that on March 26, 1929, the date upon which the letter of plaintiff constituting his first claim for disability benefits under said policy of insurance was received by defendant, the said policy of insurance No. 1196774 was no longer in force for the reason that said policy had lapsed for non-payment of premiums, and plaintiff, by execution of a form of surrender upon the 30th day of December, 1926, had given up all rights under said policy of insurance in consideration of the return to him of his unpaid note for \$551.20 hereinbefore referred to, and the release of liability under said note for premiums for any period after such surrender.

-XVI-

Defendant denies that plaintiff has duly performed, or performed at all all the conditions of said policy of insurance No. 1196774 on the part of plaintiff to be performed, and alleges that the plaintiff has refused to pay the premiums falling due under the terms of said policy upon November 27, 1925, and November 27, 1926. Defendant alleges that said policy of insurance lapsed by reason of non-payment by the plaintiff of the above premiums, and defendant further alleges that plaintiff, by execution of a form of surrender upon December 30, 1926, had given up any and all rights under said policy of insurance in consideration of the return to plaintiff of his unpaid note for \$551.20 hereinbefore referred to, and release of lia-

bility under said note for premiums for any period after such surrender. Defendant denies that there is now due, owing and unpaid from defendant to plaintiff the sum of Fifty-five Hundred Fifty Dollars (\$5,550.00), together with interest thereon as of September 1st, 1929, or any other sum and/or thereafter at the rate of One Hundred Fifty Dollars (\$150.00) per month during the period of plaintiff's alleged disability.

FURTHER ANSWERING THE SECOND CAUSE  
OF ACTION IN PLAINTIFF'S BILL DE-  
FENDANT

moves the court to dismiss said bill of plaintiff and the proceedings herein for all of the reasons hereinbefore set forth, and for the further reasons and upon the grounds that said bill does not state facts sufficient to entitle plaintiff to any relief because

(a) Said bill does not by its face and averments therein contained offer to do equity on the part of plaintiff; and

(b) That the cause of action, if any, sued upon therein is barred by the laches of plaintiff.

AS ANSWER TO THE THIRD AND FURTHER  
CAUSE OF ACTION CONTAINED IN PLAIN-  
TIFFF'S BILL DEFENDANT ADMITS, AL-  
LEGES AND DENIES AS FOLLOWS:

-XVII-

As answer to Paragraph XVII of plaintiff's bill, defendant admits the allegations contained therein.

-XVIII-

Defendant admits that on or about November 27, 1925, plaintiff delivered to defendant his note for Five Hundred

Fifty-one and 20/100 Dollars (\$551.20, on account, among other things, of the first annual premium under Policy No. 1196773 issued by defendant on plaintiff's life in the sum of Five Thousand Dollars (\$5,000.00). Defendant denies that such note was received by it in payment of such premium, and upon the contrary alleges that the giving of said note was only conditional payment and that the failure of plaintiff to pay such note when due or at any time thereafter breached the condition. Defendant further alleges that it never received any payment in cash or otherwise from plaintiff on account of Policy No. 1196773 and/or said promissory note aforesaid.

-XIX-

Defendant alleges that its agreement under the terms of said policy No. 1196773 to waive the payment of premiums in the event of the total and permanent disability of the insured has been inaccurately stated by plaintiff in Paragraph XIX of plaintiff's bill. Defendant alleges that by the terms of said policy of insurance No. 1196773, a copy of which said policy, made from original records, is hereto attached, marked Exhibit "C" and made a part hereof, it agreed to waive the payment of any *preminus* falling due after receipt of due proof by it of total and *permant* disability of plaintiff and during the continuance of such total and permanent disability of the insured, and it was further agreed that this benefit should automatically terminate upon default in the payment of any premiums under said policy of insurance.

-XX-

Defendant denies, for the reasons stated hereinbefore, in Paragraph XVIII, that the giving of the note never

paid by the plaintiff caused plaintiff to be insured under said policy of insurance No. 1196773, for a period of one year from November 27, 1925, plus the grace period of 31 days thereafter. Defendant denies that before the next policy anniversary and/or before the policy anniversary on which the age of the insured at his nearest birthday is sixty years, and, to-wit, July 31, 1926, plaintiff was taken sick and/or became ill with a bodily ailment and/or disease, to-wit, pulmonary tuberculosis and/or confined to his bed for a period of nine weeks from said last mentioned date and/or confined to his home from said time to about April 9, 1927, when plaintiff was again confined to his bed and was compelled to remain therein from said last mentioned date to the latter part of August, 1927. Denies that in consequence of such alleged illness and/or disease plaintiff became, was and/or is permanently and/or totally disabled from engaging in any occupation whatsoever for remuneration or profit; denies that said disease independent from all other causes and/or within the terms of said contract of insurance has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from said July 31st, 1926, continuing to date hereof; denies that plaintiff, due to said illness and/or disease aforesaid, will be incapacitated for an indefinite period in the future, or any period.

-XXI-

Defendant denies that plaintiff, because of illness, was unable to follow or engage in any occupation for remuneration or profit; defendant denies that plaintiff was unable to pay the promissory note dated November 25, 1925.



Defendant admits that on December 30, 1926, plaintiff surrendered said policy of insurance No. 1196773 to defendant's agent, and alleges that said surrender was voluntary on the part of plaintiff, and was not caused by worry and/or annoyance brought about by the conduct of defendant or defendant's agent.

Defendant further alleges that said policy No. 1196773 lapsed for non-payment of premiums on December 28, 1926, two days prior to the date on which said policy of insurance was surrendered.

Defendant denies that in innumerable occasions between November 25, 1926, and December 30, 1926, defendant's agent and/or representative called plaintiff by telephone and/or visited him at his home while plaintiff was confined to his home and/or his bed, with said illness, or any illness and/or disease, and/or insisted upon payment of said promissory note or the return and surrender to said agent of said policy of insurance; denies that said calls by said agent and/or representative were a source of great annoyance and/or harrassment to plaintiff and/or caused plaintiff's condition to become more serious and/or dangerous; denies that plaintiff had been advised by his physicians in attendance to refrain from worry and/or annoyance; denies that plaintiff surrendered said policy of insurance to defendant's agent and/or representative for the purpose of ridding himself of the constant and/or repeated demands and calls of defendant's said agent and/or representative for the return of said policy of insurance and/or because of any annoyance, harrassment and/or worry incidental thereto; denies that at the time of such surrender of said policy of insurance it and/or its agent and/or representative well knew or knew at all



plaintiff was suffering from pulmonary tuberculosis and/or knew plaintiff was covered and/or protected by said policy of insurance and was and/or would be entitled to the benefits therein mentioned and provided.

Denies that it or its said agent and/or representative fraudulently and/or for the purpose of deceiving plaintiff and/or fraudulently depriving or attempting to deprive plaintiff of his said or any rights under said policy of insurance, advised plaintiff that said policy of insurance had lapsed and that plaintiff was no longer insured by virtue thereof or entitled to the benefits therein recited; denies that plaintiff at said time and/or for a long time thereafter was ignorant of the true nature of his disease and/or was not aware of the fact that plaintiff was suffering from pulmonary tuberculosis; denies that it or its agent and/or representative knew plaintiff was suffering from pulmonary tuberculosis.

-XXII-

Defendant denies that plaintiff had been informed by the physician who had been attending him during his said alleged illness that the nature of said alleged illness with which he was suffering was pneumonia and pleurisy with effusions; defendant denies that plaintiff continued in said belief or any belief to on or about July 6, 1927, or any other time and/or was not aware of his true condition and/or the true and exact nature of his said illness and/or disease. Defendant denies that plaintiff at that time or any time theretofore was suffering with pulmonary tuberculosis and had been totally and/or permanently disabled from engaging in any occupation for remuneration or profit. Defendant denies that on or about July 6, 1927, when upon being examined by a physician other than the

ones in attendance upon him plaintiff was informed for the first time that his disease was pulmonary tuberculosis; defendant denies that plaintiff was stricken with pulmonary tuberculosis on July 31, 1926, or on any other date. Defendant denies that the failure of plaintiff at any time to have possession of policy No. 1196773 was due to any fraud and/or duress practiced upon plaintiff by the defendant or any of its agents.

Defendant denies that because of any fraud and/or duress plaintiff was in complete, or any ignorance of the disability features mentioned and/or contained in said policy of insurance and/or was ignorant that he was entitled to disability benefits thereunder and/or was in complete ignorance, or any ignorance and/or unaware of the requirements of said policy of insurance relative to notices and proofs to be furnished to defendant in the event of total and permanent disability. Defendant denies that plaintiff first became aware of the requirements of said policy of insurance relative to notices and proofs to the defendant in the event of total and permanent disability on or about April 10, 1929.

-XXIII-

Defendant denies that Policy No. 1196773 was in full force and effect at the time plaintiff requested claim blanks from defendant for the purpose of filing his claim for total and permanent disability benefits, to-wit, March 26, 1929, and alleges that long prior thereto the said policy of insurance No. 1196773 lapsed for non-payment of premiums, no cash having ever been paid by the plaintiff under said policy, and that because of such non-payment of premiums the provision for disability benefits had automatically terminated in accordance with the terms

of the policy, a true copy of which said policy, made from original records, is hereto attached marked Exhibit "C". Defendant admits that it refused to waive premiums under Policy No. 1196773, and alleges that the reason for such refusal was that plaintiff was not entitled to such waiver under the terms of said insurance policy.

Defendant admits that on March 26, 1929, the date upon which the letter of plaintiff constituting plaintiff's claim for waiver of premiums under said policy of insurance was received by defendant, said policy of insurance No. 1196773 was no longer in force, since said policy of insurance had lapsed for non-payment of premiums, and for the further reason that plaintiff had executed a form of surrender upon December 30, 1926, and had given up all rights under said policy of insurance in consideration of the return to plaintiff of his unpaid note for \$551.20 hereinbefore referred to, and release of liability under said note for premiums for any period after such surrender.

-XXIV-

Defendant denies that plaintiff has duly performed, or performed at all, all the conditions of said policy of insurance No. 1196773 on the part of plaintiff to be performed, and alleges that plaintiff has failed to pay the premiums falling due under the terms of said policy of insurance No. 1196773 on November 27, 1925, and on November 27, 1926.

FURTHER ANSWERING THE THIRD CAUSE OF  
ACTION IN PLAINTIFF'S BILL DEFENDANT

moves the court to dismiss said bill of plaintiff and the proceedings herein for all of the reasons hereinbefore set forth, and for the further reasons and upon the

grounds that said bill does not state facts sufficient to entitle plaintiff to any relief because

(a) Said bill does not by its face and averments therein contained offer to do equity on the part of plaintiff; and

(b) That the cause of action, if any, sued upon therein is barred by the laches of plaintiff.

FURTHER ANSWERING PLAINTIFF'S BILL AND  
THE THREE CAUSES OF ACTION THEREIN  
CONTAINED

defendant moves the court to dismiss said bill of plaintiff and the proceedings herein, for the reason that if any agent and/or purported agent of defendant did threaten or attempt to threaten plaintiff with any prosecution for or on account of any check and/or note as alleged in plaintiff's bill, or at all, the admission of which is only made for the purpose of defense in this separate defense and which is expressly denied in all other particulars, that such agent and/or purported agent was then and there acting beyond the scope of his authority.

WHEREFORE, having answered plaintiff's bill and the three causes of action therein alleged, defendant prays that said bill be dismissed, that plaintiff take nothing, and that defendant go hence with its costs herein incurred, and that it have such other, further and different relief as to the court may seem meet and equitable.

O'MELVENY, TULLER & MYERS, and  
J. R. Girling,  
Solicitors for defendant.

Address of Solicitors for defendant:

900 Title Insurance Building,  
433 South Spring Street,  
Los Angeles, California.

STATE OF CALIFORNIA,        )  
  ) SS.  
COUNTY OF LOS ANGELES. )

J. R. GIRLING being first duly sworn deposes and says:

That he is one of the solicitors for defendant in the above entitled action; that he is authorized to execute and verify the answer of defendant herein; that he makes such verification partly on his personal knowledge and partly on information furnished him by others, all of which he believes to be true and expects to prove on the trial of this action, and that the defendant herein has a full, equitable and just defense to plaintiff's claim, as hereinbefore stated in defendant's answer, and that the within answer and the allegations therein contained are not interposed for delay.

J. R. Girling.

Subscribed and sworn to before me  
this 4 day of November, 1929.

Adelia Hawkins

[Seal]

Notary Public in and for the County  
of Los Angeles, State of California.

My Commission Expires Feb. 7, 1933.

## EXHIBIT A

Copy

NUMBER	THE PENN MUTUAL (Emblem)	AMOUNT
-----		10,000.00

“We are met on the broad pathway of  
good faith and good will.”

LIFE INSURANCE COMPANY  
OF PHILADELPHIA

Hereby insures the life of  
JAMES MCCULLOCH JR.  
THE INSURED

and agrees to pay  
TEN THOUSAND Dollars,

whenever the reserve on this Policy (according to the Ordinary Life Plan and the American Experience Table of Mortality with interest at 3 per cent.), together with the accumulated surplus then to the credit of this Policy, shall equal the face amount, to James McCulloch, Jr., the insured, which payment shall be in full settlement of all demands against the said Company under this Policy; or if the said insured should die before this Policy matures as above provided, then to pay the said face amount, together with the accumulated surplus to Anna R. McCulloch, his wife, if she survive him, otherwise to his executors, administrators or assigns,

THE BENEFICIARY

upon receipt of due proof of the death of the insured and delivery of this Policy.

The right to change the beneficiary is reserved by the insured.



### DOUBLE INDEMNITY BENEFIT

The Company agrees to increase the amount payable to double the face amount stated above upon receipt of due proof that the death of the insured resulted solely from bodily injuries sustained through accidental means before the policy anniversary on which the age of the insured at nearest birthday is seventy years, as provided in section five.

### DISABILITY BENEFITS

The Company agrees to pay a monthly income of \$100.00 and waive payment of subsequent premiums upon receipt of due proof that the insured has become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years as provided in section four.

### DIVIDENDS

Dividends of Surplus under this Policy shall be awarded and may be used as provided in section one.

### FULL PAID OPTION

When at the expiration of any policy-year, the accumulated surplus to the credit of this Policy, together with its guaranteed cash surrender value as specified on the second page hereof, shall equal or exceed the net single premium required at the attained age of the insured to make this Policy full-paid, such net single premium to be calculated on the same bases as the net yearly premium on this Policy, then upon proper written application it will be declared a full-paid policy and will participate annually thereafter as such and any excess of these dividends over the amount required for the purpose above described shall then be paid in cash.

## PREMIUMS

This contract is made in consideration of the payment in advance to the Company at its Home Office of the sum of Two Hundred Seventy-five & 60/100 Dollars, at the date hereof, and upon condition that the annual premium of Two Hundred Seventy-five & 60/100 Dollars is paid on or before the Fourteenth day of October in every year until the maturity of this Policy, subject to waiver of payment of premiums in event of total and permanent disability.

The annual premium stated above includes Twenty-one & 70/100 Dollars for the Total and Permanent Disability Benefits and Twelve & 50/100 Dollars for the Double Indemnity Benefit and shall be correspondingly reduced upon any termination of such Benefits as provided in sections four and five.

Premium payments may be made annually, or in semi-annual or quarterly instalments at the rates shown on the margin hereof and as provided in section seven.

All the benefits, privileges and provisions stated on the second and third pages hereof form a part of this Policy as fully as though recited at length over the signatures hereto affixed.

IN WITNESS WHEREOF, THE PENN MUTUAL LIFE INSURANCE COMPANY of Philadelphia has caused this Policy to be signed by its President, Secretary and Actuary, attested by its Registrar, at its Home Office in Philadelphia, Pennsylvania, on the date of issue, the Fourteenth day of October 1925.

Sydney A Smith Secretary. Wm A Law President.

Attest:

.....Registrar. George R. White Actuary.

ORDINARY LIFE RATE ENDOWMENT POLICY—ANNUAL DIVIDENDS—DOUBLE INDEMNITY BENEFIT TOTAL AND PERMANENT DISABILITY BENEFITS PROVIDING FOR WAIVER OF PREMIUM AND MONTHLY INCOME PAYMENT

AGE 32

ANNUAL PREMIUM \$275.60

SEMI-ANNUAL PREMIUM \$140.60

QUARTERLY PREMIUM \$71.70

Examined by G. H. M.

made from Home Office records

I hereby certify that this is a true copy of Policy No. 1191014 issued by The Penn Mutual Life Ins. Co. on the Life of James McCulloch, Jr.

Chas V. Cornell

Asst Supervisor of Applications  
and Death Claims

Policy Form No. 6M-12 O. L. R. E. D. I. D. A. Ed. 6,  
1924.

Exhibit A

FROM THE DATE OF ISSUE THIS POLICY SHALL BE WITHOUT ANY RESTRICTIONS AS TO TRAVEL OR RESIDENCE

SECTION 1. PARTICIPATION—DIVIDENDS  
OF SURPLUS

ANNUAL DIVIDENDS. This Policy will participate in surplus while in force by payment of premiums or by waiver of premiums as provided in Section 4. Dividends will be determined and accounted for by the Company and will be available upon payment of the

second year's premium, and at the end of the second and of each subsequent policy-year.

All distributions of surplus awarded to this Policy and remaining in the hands of the Company shall be accumulated at four per cent. per annum, compound interest, or the average net rate realized by the Company upon its assets if it be less; this surplus and interest, increased annually by such addition as may be awarded by the Board of Trustees, will be used to mature this Policy as an Endowment, as provided on the first page hereof, or in event of the death of the insured during the continuance in full force of this Policy, the accumulated surplus will be paid in addition to the face amount of this Policy.

Any accumulated surplus to the credit of this Policy may either be drawn in cash, or used in reduction of premium, or applied to increase the paid-up insurance provided for by the terms of this Policy by the amount of similar paid-up life insurance which the accumulated surplus would purchase at the attained age of the insured according to the present established rates of the Company, provided, however, that if such paid-up insurance shall exceed the face amount of this Policy, satisfactory evidence of insurability must first be furnished to the Company.

If no other option is selected, dividends shall be paid in cash.

POST-MORTEM DIVIDEND. Upon the death of the insured during any policy-year, after the first, while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4, the Company will pay a post-mortem dividend for the policy-year current at the date of the insured's death.

## SECTION 2. POLICY LOANS

Loans will be available during the third policy-year, if three years' premiums have been paid, and at any time

thereafter while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4 and may be obtained on proper assignment and delivery of this Policy and on the sole security hereof.

The amount of such loan may be any sum which with interest to the end of the current policy-year will not exceed the cash value at the end of such year less any existing indebtedness on this Policy and any unpaid balance of the current policy-year's premium. The cash value will be the full reserve on this Policy as provided in Section 3 and will be increased by the full reserve on any dividend additions.

The indebtedness or any part thereof may be repaid to the Company at any time.

Interest on loans will be at the rate of 6 per cent. per annum payable at the end of each policy-year. If not paid when due it shall be added to the existing indebtedness provided the total indebtedness on this Policy would not then exceed the cash value plus the full reserve on any dividend additions, and the indebtedness thus created shall bear interest at the same rate.

Failure to repay any such loans or interest thereon shall not void this Policy unless the total indebtedness hereon with interest shall equal or exceed the cash value plus the full reserve on any dividend additions, nor until one month after notice shall have been mailed to the last-known address of the insured and of the assignee, if any, of record at the Home Office of the Company. All indebtedness on account of this Policy, with accrued interest, shall be deducted from any settlement hereunder. The Company shall have the right to defer the making of a loan hereon (unless for the purpose of paying premiums on policies in this Company) for a period of not exceeding ninety (90) days from the date of the application therefor.

### SECTION 3. POLICY VALUES— NON-FORFEITURE IN EVENT OF LAPSE

The full reserve on this Policy will be available upon lapse through non-payment of premiums at the end of the third policy-year or at any time thereafter, and may be used as follows:

- (1) To extend automatically the face amount of of this Policy as Term Insurance without participation; or,
- (2) To purchase paid-up participating life insurance upon proper written application within one month from the date of lapse; or,
- (3) To pay the cash value of this Policy upon proper release and delivery of this Policy within one month from the date of lapse.

The following table states such values for completed policy years. These values will be correspondingly increased for any fractional part of a year's premium which has been paid.

The full reserve on any paid-up insurance or extended insurance, less any indebtedness thereon, will be available as a cash value at any time upon proper release and delivery of this Policy.

The cash value will be increased by the full reserve on any dividend additions and diminished by any existing indebtedness; the amount of paid-up insurance shall be increased or diminished in the same proportion as such cash value is increased or diminished; or the extended insurance shall be for the face amount of this Policy less any indebtedness, and for such a term as such adjusted cash value will provide.

The Company shall have the right to defer the payment of any surrender value of this Policy (unless for the purpose of paying premiums on policies in this Com-



pany) for a period of not exceeding ninety (90) days from the date of the application therefor.

The reserve basis of the following table is the American Experience Table of Mortality with interest at 3 per cent. per annum, according to the net level premium method.

Table of Extended Insurance, Paid-up Insurance, and Loan or Cash Values provided for by this Policy

At End of Year	Term of Automatic Extended Insurance Without Participation		These Values are for \$1000 Insurance For this Policy multiply by TEN	
			Participating Paid-Up Life Insurance On Surrender	Loan or Cash Surrender Values
3d	4 years	72 days	\$ 84	\$ 35 17
4th	5 "	241 "	111	47 60
5th	7 "	47 "	139	60 39
6th	8 "	208 "	166	73 54
7th	9 "	344 "	193	87 05
8th	11 "	75 "	220	100 94
9th	12 "	121 "	246	115 19
10th	13 "	115 "	272	129 83
11th	14 "	56 "	298	144 86
12th	14 "	313 "	324	160 27
13th	15 "	158 "	349	176 05
14th	15 "	329 "	374	192 20
15th	16 "	96 "	398	208 72
16th	16 "	197 "	422	225 58
17th	16 "	269 "	446	242 77
18th	16 "	316 "	469	260 25
19th	16 "	340 "	491	278 00
20th	16 "	343 "	513	296 00
25th	16 "	136 "	615	388 81
30th	15 "	66 "	701	483 60

Loans are available during the policy-year as provided in Section 2.

SECTION 4. TOTAL AND PERMANENT DISABILITY BENEFITS; WAIVER OF PREMIUM AND MONTHLY INCOME PAYMENT

MONTHLY INCOME PAYMENT. If the insured shall become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the Company will pay to the insured a monthly income equal to one per cent. of the face amount of this Policy (exclusive of any dividend additions). Said income shall start upon the date of receipt by the Company at its Home Office during the insured's lifetime of due proof of total and permanent disability and continue thereafter for the period of the said total disability of the insured prior to the maturity of this Policy. Interest on any indebtedness under this Policy may be deducted from the monthly income payments hereunder.

WAIVER OF PREMIUM. The Company will waive the payment of any premium falling due after receipt of due proof of total and permanent disability and during the continuance of the said total disability of the insured.

NO DEDUCTION FOR BENEFITS GRANTED. In any settlement under this Policy the Company shall not make any deduction on account of monthly income payments made or premiums waived.

PARTICIPATION. This Policy shall continue to participate in surplus during the period of said total and permanent disability.

INCREASING VALUES. Policy values shall increase from year to year in the same manner as though any premiums waived hereunder had been duly paid in cash.

**TOTAL AND PERMANENT DISABILITY.** Disability shall be total and permanent if the insured is, upon the receipt of due proof, totally and permanently prevented by bodily injury or disease from engaging in any occupation whatever for remuneration or profit and became so disabled while this Policy was in force by payment of premium. Immediately upon receipt of due proof of such total and permanent disability, the benefits shall become effective, subject to the conditions herein provided. If said total disability has been continuous for not less than three consecutive months immediately preceding the receipt of due proof, such disability, if not already approved as permanent, shall nevertheless be deemed to be permanent and upon the receipt of due proof of such disability the benefits shall become effective, subject to the conditions herein provided.

**RECOGNIZED DISABILITIES.** Without prejudice to any other cause of disability, the Company will recognize the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, as total and permanent disability.

**RECOVERY FROM DISABILITY.** The Company, at any time until Disability Benefits have been effective for two full years, and not oftener than once a year thereafter, may require of the insured due proof of the continuance of such total disability. Upon failure to furnish such proof, or if it appear at any time that the insured has engaged or has become able to engage in any occupation whatever for remuneration or profit, all Dis-

ability Benefits under this Policy, except in the case of recognized disabilities hereinbefore mentioned, shall thereupon cease.

TERMINATION. This provision for Total and Permanent Disability Benefits shall automatically terminate:

- (1) Upon default in the payment of any premium;
- (2) If this Policy be surrendered for its cash value, or if any paid-up insurance or extended insurance provided for in Section 3 of this Policy become effective;
- (3) Upon the policy anniversary on which the age of the insured at nearest birthday is sixty years, or if this Policy mature prior to such policy anniversary, then upon such maturity;
- (4) If the insured engage in Military or Naval Service in time of war;
- (5) If the disability of the insured result from aeronautic or submarine casualty;
- (6) If the disability of the insured be voluntarily self-inflicted.

Upon termination under (4), (5), or (6) above, the liability of the Company under this Total and Permanent Disability Benefits provision shall be limited to the amount of the current unearned premium for such benefits, which shall be returned by the Company upon notice.

Upon any termination of this provision for Disability Benefits, or upon receipt by the Company of proper request for discontinuance thereof, accompanied by this Policy for endorsement, any premium thereafter due shall be reduced by the amount payable for the Disability Benefits stated on the first page of this Policy.

## Exhibit A

## SECTION 5. DOUBLE INDEMNITY BENEFIT

The Company will pay a Double Indemnity Benefit equal to and in addition to the face amount of this Policy, upon receipt of due proof that the death of the insured resulted solely from bodily injuries effected directly and exclusively by external, violent and accidental means, and that such death occurred within sixty days after sustaining such injuries. This Double Indemnity Benefit shall not be payable if the death of the insured resulted directly or indirectly from illness or disease of any kind or from physical or mental infirmity; from poison administered whether accidentally or intentionally by the insured or by another; from self-destruction at any time whether sane or insane; from any violation of law by the insured; from aeronautic or submarine casualty; or if the injuries were sustained while performing Military or Naval Service in time of war or riot, or while performing police duty as a member of any Military or Naval or Police organization. The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law.

This provision for Double Indemnity Benefit shall automatically terminate:

- (1) Upon default in the payment of any premium;
- (2) If this Policy be surrendered for its cash value, or if any paid-up insurance or extended insurance provided for in Section 3 of this Policy become effective;
- (3) Upon the policy anniversary on which the age of the insured at nearest birthday is seventy years, or if this Policy mature prior to such policy anniversary, then upon such maturity.

Upon any termination of this provision for Double Indemnity Benefit or upon receipt by the Company of proper request for discontinuance thereof, accompanied by this Policy for endorsement, any premium thereafter due shall be reduced by the amount payable for the Double Indemnity Benefit stated on the first page of this Policy.

## SECTION 6. CHANGE OF BENEFICIARY AND ASSIGNMENT

CHANGE OF BENEFICIARY. Whenever the right to change the beneficiary has been reserved in this Policy or in the last Designation of Beneficiary recorded at the Home Office of the Company, the insured or his duly appointed guardian if he be not of legal age (subject to any previous assignment of this Policy duly filed at the Home Office) shall have full power while this Policy is in force to designate a new beneficiary, with or without reserving the right of future designation, by filing written notice thereof at the Home Office and such change shall take place upon such filing and not before.

Furthermore whenever such right to change has been reserved, the insured shall be entitled without the consent of the beneficiary, to any cash dividends declared on this Policy and to the loan or cash value or paid-up insurance herein provided for.

ASSIGNMENT. Any assignment of this Policy shall be furnished to the Company and a duplicate thereof attached hereto. No assignment shall impose any obligation on this Company until the original thereof has been filed at the Home Office of the Company, nor does the Company guarantee the sufficiency or validity of any assignment.



## SECTION 7. PAYMENT OF PREMIUMS

PAYMENT OF PREMIUMS. All premiums are due and payable in advance at the Home Office of the Company in the City of Philadelphia, or they may be paid to agents on or before the dates when due in exchange for receipts signed by the President, a Vice-President, Secretary, Treasurer, or Actuary and countersigned by the agent.

The insurance under this Policy is based upon annual premiums payable in advance; but on any anniversary, upon written request, payments may be made semi-annually or quarterly in advance at the premium rates therefor now in use by the Company. Any unpaid portion of the premium for the policy-year during which the death of the insured occurs will be deducted from the sum payable under this Policy.

GRACE IN PAYMENT OF PREMIUMS. A grace of thirty-one days, during which this Policy shall remain in force, will be granted for the payment of premiums or regular instalments thereof, after the first. If the death of the insured occur during the days of grace, the sum necessary to complete payment of premium for the then current policy-year will be deducted from the amount payable hereunder.

REINSTATEMENT. In the event of default in premium payments, unless the cash value has been duly paid, this Policy may be reinstated at any time upon evidence of insurability satisfactory to the Company and the payment of all overdue premiums and the payment or reinstatement of any other indebtedness to the Company upon said Policy, with interest at the rate of 6 per cent. per annum.

## SECTION 8. OTHER PROVISIONS

INCONTESTABILITY. This Policy and the application therefor, a copy of which is attached hereto, constitute the entire contract between the parties. This Policy shall be incontestable after it has been in force during the lifetime of the insured for a period of one year from its date of issue except for non-payment of premiums and except as to provisions relating to Disability and Double Indemnity Benefits. All statements made by the insured or on his behalf shall, in the absence of fraud, be deemed representations and not warranties and no such statement shall avoid or be used in defense under this Policy unless it is contained in the written and printed application and a copy of such application is attached to this Policy when issued.

AGE. Any error in stating the age of the insured shall be adjusted by the Company paying under any of the provisions of this Policy such amount as the premium actually paid would have purchased at the correct age.

SUICIDE. If the insured, whether sane or insane, shall commit suicide within one year from the date of issue of this Policy, the liability of the Company shall be limited to the amount of the premium paid hereon.

ALTERATIONS. No alteration of this Policy, or waiver of any of its conditions shall be valid unless endorsed hereon and signed by an Officer of the Company. No agent is authorized to modify, alter or enlarge this contract or to bind the Company by any promise or undertaking as to distribution of surplus or any future award of interest.

## SECTION 9. OPTIONS FOR PAYMENT OF THIS POLICY AS AN INCOME

The insured, subject to any designation of beneficiary or assignment of this Policy filed with the Company, as provided in Section 6, may elect in writing that the net proceeds of this Policy at maturity, or any part thereof, or the cash value before maturity, not less than \$1,000, shall be payable according to any of the following options. In such written election no beneficiary entitled to the proceeds of this Policy or any part thereof or any instalment of interest or principal to become due thereon shall have the right to commute, withdraw, surrender, encumber, alienate or assign the same upon any terms whatsoever unless by the written permission of the insured.

The beneficiary entitled to receive the net proceeds when payable, may elect in writing to have the net proceeds payable according to any of the following options, in event of the failure of the insured to do so.

The tables under Options A, B and C are based upon a policy the net proceeds of which are \$1,000, and apply pro rata to this Policy, and provide for annual or monthly instalments, first instalment to be paid at maturity or upon proper surrender for cash value. The income may be made payable in equivalent equal semi-annual or quarterly instalments upon proper request; to find the semi-annual instalment, multiply the annual instalment by .5037 and to find the quarterly instalment multiply by .2528.

OPTION A. INCOME FOR ONE TO THIRTY YEARS CERTAIN in annual or monthly instalments as may be elected according to the following table.

Number of									
Years	1	2	3	4	5	6	7	8	
Annual	1000.00	507.39	343.23	261.19	211.99	179.22	155.83	138.31	
Monthly	84.50	42.87	29.00	22.07	17.91	15.14	13.17	11.69	
Number of									
Years	9	10	11	12	13	14	15	16	
Annual	124.69	113.82	104.93	97.54	91.29	85.95	81.33	77.29	
Monthly	10.54	9.62	8.87	8.24	7.71	7.26	6.87	6.53	
Number of									
Years	17	18	19	20	21	22	23	24	
Annual	73.74	70.59	67.78	65.26	62.98	60.92	59.04	57.33	
Monthly	6.23	5.96	5.73	5.51	5.32	5.15	4.99	4.84	
Number of									
Years	25	26	27	28	29	30			
Annual	55.76	54.31	52.97	51.74	50.60	49.53			
Monthly	4.71	4.59	4.48	4.37	4.28	4.19			

OPTION B. INCOME FOR TWENTY YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	39.52	39.70	39.89	40.08	40.28	40.49	40.71	40.94
Monthly	3.34	3.35	3.37	3.39	3.40	3.42	3.44	3.46
Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	41.18	41.43	41.69	41.96	42.24	42.53	42.84	43.16
Monthly	3.48	3.50	3.52	3.55	3.57	3.59	3.62	3.65
Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	43.49	43.84	44.21	44.59	44.98	45.39	45.82	46.27
Monthly	3.67	3.70	3.74	3.77	3.80	3.84	3.87	3.91
Age of Beneficiary	34	35	36	37	38	39	40	
Annual	46.74	47.23	47.73	48.26	48.80	49.36	49.95	
Monthly	3.95	3.99	4.03	4.08	4.12	4.17	4.22	
Age of Beneficiary	41	42	43	44	45	46	47	48
Annual	50.55	51.17	51.81	52.46	53.12	53.80	54.50	55.19
Monthly	4.27	4.32	4.38	4.43	4.49	4.55	4.61	4.66
Age of Beneficiary	49	50	51	52	53	54	55	56
Annual	55.89	56.59	57.29	57.98	58.66	59.33	59.97	60.58
Monthly	4.72	4.78	4.84	4.90	4.96	5.01	5.07	5.12
Age of Beneficiary	57	58	59	60	61	62	63	64
Annual	61.17	61.72	62.24	62.71	63.15	63.54	63.89	64.19
Monthly	5.17	5.22	5.26	5.30	5.34	5.37	5.40	5.42
Age of Beneficiary	65	66	67	68	69	70 and over		
Annual	64.45	64.67	64.85	64.99	65.09	65.16		
Monthly	5.45	5.46	5.48	5.49	5.50	5.51		

OPTION C. INCOME FOR TEN YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	40.62	40.81	41.01	41.23	41.45	41.68	41.92	42.17
Monthly	3.43	3.45	3.47	3.48	3.50	3.52	3.54	3.56
Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	42.43	42.70	42.99	43.29	43.60	43.93	44.27	44.63
Monthly	3.59	3.61	3.63	3.66	3.68	3.71	3.74	3.77
Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	45.01	45.40	45.81	46.25	46.70	47.19	47.69	48.22
Monthly	3.80	3.84	3.87	3.91	3.95	3.99	4.03	4.07
Age of Beneficiary	34	35	36	37	38	39	40	41
Annual	48.77	49.36	49.98	50.63	51.31	52.01	52.74	53.51
Monthly	4.12	4.17	4.22	4.28	4.34	4.39	4.46	4.52
Age of Beneficiary	42	43	44	45	46	47	48	49
Annual	54.27	55.06	55.90	56.78	57.71	58.69	59.72	60.79
Monthly	4.59	4.65	4.72	4.80	4.88	4.96	5.05	5.14
Age of Beneficiary	50	51	52	53	54	55	56	57
Annual	61.92	63.09	64.32	65.60	66.93	68.31	69.73	71.20
Monthly	5.23	5.33	5.44	5.54	5.66	5.77	5.89	6.02
Age of Beneficiary	58	59	60	61	62	63	64	65
Annual	72.72	74.27	75.85	77.45	79.07	80.70	82.32	83.93
Monthly	6.14	6.28	6.41	6.54	6.68	6.82	6.96	7.09
Age of Beneficiary	66	67	68	69	70	71	72	73
Annual	85.52	87.07	88.57	90.02	91.40	92.70	93.91	95.02
Monthly	7.23	7.36	7.48	7.61	7.72	7.83	7.94	8.03
Age of Beneficiary	74	75	76	77	78	79	80 and over	
Annual	96.02	96.90	97.76	98.59	99.38	100.02	100.52	
Monthly	8.11	8.19	8.26	8.33	8.40	8.45	8.49	



The income under Option A or the income during the instalments-certain period under Option B or C, after the first year, will be increased annually by such surplus as may be awarded by the Board of Trustees. Upon the death of any beneficiary, any unpaid instalments under Option A or unpaid instalments-certain under Option B or C, or the commuted value thereof, calculated upon the basis of 3 per cent. per annum compound interest, will be paid as agreed upon in the election of the option.

Options B and C are based on the age of the beneficiary at last birthday and are not available when an association, firm or corporation is beneficiary or assignee.

OPTION D. INTEREST INCOME ON THE NET PROCEEDS payable for such a period as may be agreed upon in the election of this option.

OPTION E. INCOME OF A FIXED AMOUNT PAYABLE UNTIL THE NET PROCEEDS AND INTEREST PAYMENTS TO BE ADDED THERETO ARE EXHAUSTED, the final payment to be the balance then remaining with the Company.

Under Options D and E, the net proceeds are left with the Company at interest at the rate of 3 per cent. per annum, increased annually by such additions as may be awarded by the Board of Trustees, and the income may be made payable annually or in equivalent equal semi-annual, quarterly or monthly payments commencing at the end of the first interest period, with a further payment for the period elapsing between the last regular payment and the date of death of the beneficiary. Payments of principal and interest shall be subject to such provisions as may be agreed upon in the election of either of these options.

Exhibit A

[Stamped on face]: Disability Claim Examined.

1191014  
No.Ed. 3-24

APPLICATION FOR INSURANCE IN  
THE PENN MUTUAL LIFE INSURANCE COMPANY  
OF PHILADELPHIA, PA.

James McCulloch, Jr., vs.

- 1 A. Name in Full (please print)  
James McCulloch Jr.
- B. Residence Address  
No. Street City County State  
4275 Ingleside Ave, San Diego, Calif.
- C. If in County  
.....Miles.... Direction How Long Have  
You Resided at  
R.F.D. From Above City. Present Address? 9 Years
- 4 A. When and Where Were you  
Born?  
Place County State  
Baltimore Baltimore Md.
- B. Day Month Year Age Nearest  
6 Dec. 1893 Birthday 32
5. Are You (Indicate by X)  
Married X Single.... Widower....  
Widow....
- 6 A. What Other Insurance Have You  
on Your Life?  
Company Amount  
Metropolitan 20 Pay Life 16,000.00  
Acasia " " 5,000.00
- D. Business Address  
No. Street City County State  
914 Beech San Diego, Calif
- E. Send Premium Notices to  
914 Beech St. San Diego, Calif.

- B. Have You Ever Applied to Any Company or Agent Without Receiving a Policy of the Exact Kind and Amount Applied for? No
- C. Are Any Applications Now Pending (Give Details) No
- 7 A. Sum to Be Insured B. Plan  
\$10,000.00 O.L.R.E.
- C. Premiums Payable  
√ Annually  
Semi-Annually  
Quarterly
- D. If Disability Benefits Desired, Indicate by X  
Disability Waiver  
of Premium ....  
Disability Waiver of  
Premium and Annuity X  
Double Indemnity X
- 8. How is Surplus to Be Used?  
(Rule out Those Not Desired)  
To Reduce Premiums  
To Increase Amount Insured

- F. If Married Woman, Give Husband's Name
- G. Places of Residence Last Five Years  
San Diego, Calif.
- H. Do You Intend to Change Residence or Travel Outside the U. S.? (Give Details)  
No.
- I. Are You Engaged Do You Intend so to Engage?  
in Military or Naval Service? No
- J. Are You Engaged in Do You Intend so to Engage?  
Aeronautics or Submarine Service? No
- 2A. Occupation (State Kind of Business)  
Proprietor and Superintendent McCulloch Hospital
- B. Occupation During the Last Five Years  
As Above
- C. Any Change of Occupation Contemplated, Either Temporary or Permanent? (Give Details) No

- 3 A. To Whom Shall Policy Be Made Payable?  
Anna R. McCulloch  
If Said Beneficiary Outlives me, Otherwise to My Estate
- B. Address San Diego, Cal. C. Relationship  
4275 Ingleside Ave. Wife
- D. Beneficiary's Date E. Do you Reserve  
of Birth the Right to Change Beneficiary?  
June 1st, 1893 Yes
- F. If Beneficiary Is Married Woman, State  
Maiden Name Husband's Name  
Rogan

To Accumulate at 3% Interest  
 To Accelerate Maturity

- 9. What Settlement, If Any, Was Effected for Premium on Policy Hereby Applied For? Note

Remarks (Use This Space for Beneficiary Provisions, Preliminary Term Premiums, Etc.)

-----  
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For Home Office Endorsements Only

[On Margin]: NOTICE—THE FULL NAMES of all persons must be written and signed plainly and distinctly. Names must not be abbreviated. Every question must be fully answered. When a Creditor insures the life of a Debtor, both must sign.

My statements and answers to the questions printed above, and my statements and answers made and given to the Company's Medical Examiner, are full, complete and true. Upon them I base my application for insurance, and agree that they shall be regarded as a part of

the contract if and when issued. If the premium on the insurance herein applied for is not paid at the time of making this application, the contract of insurance shall not be in force unless or until a policy shall be issued and delivered to me and the first premium thereon actually paid during my lifetime and good health. If settlement is effected in accordance with the attached receipt at the time of making this application, the policy shall be in force as of the date of such settlement, provided the application is approved by the Company at the Home Office. The policy if and when issued and delivered to me, shall be in the form now in use by the Company. I understand that neither agents nor examiners have any authority to modify, alter or enlarge contracts. The foregoing agreements and declarations are made on behalf of myself and of any beneficiary under any policy on my life issued by the Company upon this application. 130473 to 130475

My acceptance of any policy issued on this application will constitute a ratification by me of any correction in or addition to this application made by the Company and noted in the space provided for "Home Office Endorsements Only."

In Witness Whereof, the applicant has hereunto subscribed his name. Dated at San Diego the 29 day of September 1925

Witness Present:

Don C. Carrell

Signature of the person  
proposed for insurance.....  
Sign the Names in full.

James McCulloch, Jr.

No. 434230

QUESTIONS TO BE ANSWERED BY THE PERSON TO BE INSURED

Name of Applicant James McCulloch Jr. Examined 11 A. M. This 30th Day of Sept. 1925.  
(Write name in printed letters)

At San Diego, County of San Diego State of Calif. Residence 4275 Ingleside

Do you Contemplate Any Change of Residence or Occupation? No Date of Birth? Dec. 6, 1893 Name of Agent? D. C. Carrell Henking & Randolph

10. A.	Age if Living	State of Health	Age at Death	Cause of Death	Duration of Fatal Illness
Father	89	Good			
Mother			57	(Gall Bladder)	
Full Brothers {	How Many Living	2		(Acidosis from Operation)	
	" " Dead?	0			
Full Sisters {	How Many Living	1			3 days
	" " Dead	0			

Wife or Husband's Age If Living 31 State of Health Good Age at Death Cause of Death

Ages Attained: Father's D.K. Mother D.K. Father's D.K. Mother's D.K. Mother D.K. Mother D.K.



(B) Has any near relative, uncles, aunts and grandparents included, had tuberculosis (consumption), cancer, apoplexy or Bright's disease. Explain fully.  
 If the family history shows a lack of longevity, give number and ages of uncles and aunts. See Note 6.

11 A. Are you now in good health? B. When were you last attended by a physician or consulted one? C. For what disease?

D. Give details in full.

E. Give name and residence of the physician who attended you.

F. Give name and residence of your medical adviser, or family physician, to whom you now refer for a certificate, if deemed necessary.

G. Has any physician ever given an unfavorable opinion of your insurability after either a formal or an informal examination?

H. Has any physician ever advised you to try a change of climate?

12. A. Have you ever been ruptured? B. Have you a hernia now? C. If so, do you now wear a suitable truss? D. Do you agree to wear one while insured in this company? Note 7.

A. Yes. B. 1920. C. Crushed lt. middle finger

D. Caught finger in bearing of auto.

E. Dr. Mott Arnold. Front & Spruce Sts., City

F. None

G. No

H. No

A. No

B. No  
 C. —  
 D. Yes—if necessary

- |  |         |
|--|---------|
|  | B. None |
| 13. A. Do you now use intoxicating liquors?  | A. No   |
| B. To what extent?   | C. No   |
| C. Have you ever used intoxicating liquors to excess? If so, explain the duration and extent of excess, and when last.   | D. No   |
| D. Have you ever taken a cure for inebriety? Note 6.   | No      |
| 14. Have you ever used opium, morphia, chloral or any narcotic, unless regularly prescribed by a physician? If so, explain fully.                                | A. No   |
| 15. A. Have you had insanity, apoplexy, palsy, vertigo, convulsions, sunstroke, congestion, inflammation, or any other disorder of the brain or nervous system?  | B. No   |
| B. Have you had asthma, consumption, spitting of blood, habitual cough and expectoration, palpitation, or any disease of the throat, heart or lungs?             | C. No   |
| C. Have you had appendicitis, indigestion, biliousness, cancer, or any tumor, pelagra, chronic diarrhoea, ear discharge, dropsy, fistula, gall-stones or gravel, |         |

renal or hepatic colic, open sores, inflammatory rheumatism, gout, syphilis or stricture, or any disease of the liver, kidneys, or bladder? Notes 8 and 9.

D. Have you any defect in hearing, in vision of either eye, any malformation or varicose veins?

D. No

E. Are you now, or have you recently been associated with a person who has or has had consumption?

E. No

16. Have you ever had illness, disease, injury or operation other than as stated by you above? If so, give full particulars, date, duration, severity, etc., of each. Use reverse side if necessary.

Yes, fract. rt. forearm—both bones above wrist—complete recovery.

I Hereby Agree, That all the foregoing statements and answers, made to the Company's Medical Examiner, are a part of my application for insurance, are declared to be full, complete and true, and are offered to the Company as a consideration for the Contract.

Witnessed by  
the Examiner

H. S. Anderton, M. D.

Signature of the person  
proposed for insurance

James McCulloch, Jr.

[On Cover]: COPY

No.....

THE  
PENN MUTUAL LIFE  
INSURANCE COMPANY  
PHILADELPHIA

NAME OF INSURED  
JAMES MCCULLOCH, JR.

ORDINARY LIFE RATE  
ENDOWMENT POLICY

ANNUAL DIVIDENDS  
  
DOUBLE INDEMNITY BENEFIT  
TOTAL AND PERMANENT  
DISABILITY BENEFITS

PROVIDING FOR  
WAIVER OF PREMIUM AND  
MONTHLY INCOME PAYMENT

Amount, \$10,000.00

Date of Policy, October 14th 1925

Yearly Payment, \$275.60  
During the Continuance of this Policy  
Payable.....Annually

Due the 14th day of October

EXHIBIT B

Copy

NUMBER	THE PENN MUTUAL (Emblem)	AMOUNT
-----		15,000.00

“We are met on the broad pathway of  
good faith and good will.”

LIFE INSURANCE COMPANY  
OF PHILADELPHIA

Hereby insures the life of  
JAMES MCCULLOCH JR.  
THE INSURED

and agrees to pay  
FIFTEEN THOUSAND Dollars,

whenever the reserve on this Policy (according to the Ordinary Life Plan and the American Experience Table of Mortality with interest at 3 per cent.), together with the accumulated surplus then to the credit of this Policy, shall equal the face amount, to James McCulloch, Jr., the insured, which payment shall be in full settlement of all demands against the said Company under this Policy; or if the said insured should die before this Policy matures as above provided, then to pay the said face amount, together with the accumulated surplus to Anna R. McCulloch, his wife, if she survive him, otherwise to his executors, administrators or assigns,

THE BENEFICIARY

upon receipt of due proof of the death of the insured and delivery of this Policy.

The right to change the beneficiary is reserved by the insured.

### DOUBLE INDEMNITY BENEFIT

The Company agrees to increase the amount payable to double the face amount stated above upon receipt of due proof that the death of the insured resulted solely from bodily injuries sustained through accidental means before the policy anniversary on which the age of the insured at nearest birthday is seventy years, as provided in section five.

### DISABILITY BENEFITS

The Company agrees to pay a monthly income of \$150.00 and waive payment of subsequent premiums upon receipt of due proof that the insured has become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years as provided in section four.

### DIVIDENDS

Dividends of Surplus under this Policy shall be awarded and may be used as provided in section one.

### FULL PAID OPTION

When at the expiration of any policy-year, the accumulated surplus to the credit of this Policy, together with its guaranteed cash surrender value as specified on the second page hereof, shall equal or exceed the net single premium required at the attained age of the insured to make this Policy full-paid, such net single premium to be calculated on the same bases as the net yearly premium on this Policy, then upon proper written application it will be declared a full-paid policy and will participate annually thereafter as such and any excess of these dividends over the amount required for the purpose above described shall then be paid in cash.



PREMIUMS

This contract is made in consideration of the payment in advance to the Company at its Home Office of the sum of Four Hundred Thirteen & 40/100 Dollars, at the date hereof, and upon condition that the annual premium of Four Hundred Thirteen & 40/100 Dollars is paid on or before the Twenty-seventh day of November in every year until the maturity of this Policy, subject to waiver of payment of premiums in event of total and permanent disability.

The annual premium stated above includes Thirty-two & 55/100 Dollars for the Total and Permanent Disability Benefits and Eighteen & 75/100 Dollars for the Double Indemnity Benefit and shall be correspondingly reduced upon any termination of such Benefits as provided in sections four and five.

Premium payments may be made annually, or in semi-annual or quarterly instalments at the rates shown on the margin hereof and as provided in section seven.

All the benefits, privileges and provisions stated on the second and third pages hereof form a part of this Policy as fully as though recited at length over the signatures hereto affixed.

IN WITNESS WHEREOF, THE PENN MUTUAL LIFE INSURANCE COMPANY of Philadelphia has caused this Policy to be signed by its President, Secretary and Actuary, attested by its Registrar, at its Home Office in Philadelphia, Pennsylvania, on the date of issue, the Fourteenth day of October 1925.

Sydney A Smith Secretary.      Wm A Law President.

Attest:

.....Registrar.      George R. White Actuary.

ORDINARY LIFE RATE ENDOWMENT POLICY—ANNUAL DIVIDENDS—DOUBLE INDEMNITY BENEFIT TOTAL AND PERMANENT DISABILITY BENEFITS PROVIDING FOR WAIVER OF PREMIUM AND MONTHLY INCOME PAYMENT

AGE 32

ANNUAL PREMIUM \$413.40

SEMI-ANNUAL PREMIUM \$210.90

QUARTERLY PREMIUM \$107.55

Examined by M. C. F.

made from Home Office records  
I hereby certify that this is a true copy of Policy No. 1196774 issued by The Penn Mutual Life Ins. Co. on the Life of "James McCulloch, Jr."

Chas V. Cornell

Asst Supervisor of Applications  
and Death Claims

Policy Form No. 6M-12 O. L. R. E. D. I. D. A. Ed. 5,  
1924.

Exhibit B

FROM THE DATE OF ISSUE THIS POLICY SHALL BE WITHOUT ANY RESTRICTIONS AS TO TRAVEL OR RESIDENCE

SECTION 1. PARTICIPATION—DIVIDENDS  
OF SURPLUS

ANNUAL DIVIDENDS. This Policy will participate in surplus while in force by payment of premiums or by waiver of premiums as provided in Section 4. Dividends will be determined and accounted for by the Company and will be available upon payment of the

second year's premium, and at the end of the second and of each subsequent policy-year.

All distributions of surplus awarded to this Policy and remaining in the hands of the Company shall be accumulated at four per cent. per annum, compound interest, or the average net rate realized by the Company upon its assets if it be less; this surplus and interest, increased annually by such addition as may be awarded by the Board of Trustees, will be used to mature this Policy as an Endowment, as provided on the first page hereof, or in event of the death of the insured during the continuance in full force of this Policy, the accumulated surplus will be paid in addition to the face amount of this Policy.

Any accumulated surplus to the credit of this Policy may either be drawn in cash, or used in reduction of premium, or applied to increase the paid-up insurance provided for by the terms of this Policy by the amount of similar paid-up life insurance which the accumulated surplus would purchase at the attained age of the insured according to the present established rates of the Company, provided, however, that if such paid-up insurance shall exceed the face amount of this Policy, satisfactory evidence of insurability must first be furnished to the Company.

If no other option is selected, dividends shall be paid in cash.

**POST-MORTEM DIVIDEND.** Upon the death of the insured during any policy-year, after the first, while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4, the Company will pay a post-mortem dividend for the policy-year current at the date of the insured's death.

## SECTION 2. POLICY LOANS

Loans will be available during the third policy-year, if three years' premiums have been paid, and at any time

thereafter while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4 and may be obtained on proper assignment and delivery of this Policy and on the sole security hereof.

The amount of such loan may be any sum which with interest to the end of the current policy-year will not exceed the cash value at the end of such year less any existing indebtedness on this Policy and any unpaid balance of the current policy-year's premium. The cash value will be the full reserve on this Policy as provided in Section 3 and will be increased by the full reserve on any dividend additions.

The indebtedness or any part thereof may be repaid to the Company at any time.

Interest on loans will be at the rate of 6 per cent. per annum payable at the end of each policy-year. If not paid when due it shall be added to the existing indebtedness provided the total indebtedness on this Policy would not then exceed the cash value plus the full reserve on any dividend additions, and the indebtedness thus created shall bear interest at the same rate.

Failure to repay any such loans or interest thereon shall not void this Policy unless the total indebtedness hereon with interest shall equal or exceed the cash value plus the full reserve on any dividend additions, nor until one month after notice shall have been mailed to the last-known address of the insured and of the assignee, if any, of record at the Home Office of the Company. All indebtedness on account of this Policy, with accrued interest, shall be deducted from any settlement hereunder. The Company shall have the right to defer the making of a loan hereon (unless for the purpose of paying premiums on policies in this Company) for a period of not exceeding ninety (90) days from the date of the application therefor.

### SECTION 3. POLICY VALUES— NON-FORFEITURE IN EVENT OF LAPSE

The full reserve on this Policy will be available upon lapse through non-payment of premiums at the end of the third policy-year or at any time thereafter, and may be used as follows:

- (1) To extend automatically the face amount of this Policy as Term Insurance without participation; or,
- (2) To purchase paid-up participating life insurance upon proper written application within one month from the date of lapse; or,
- (3) To pay the cash value of this Policy upon proper release and delivery of this Policy within one month from the date of lapse.

The following table states such values for completed policy years. These values will be correspondingly increased for any fractional part of a year's premium which has been paid.

The full reserve on any paid-up insurance or extended insurance, less any indebtedness thereon, will be available as a cash value at any time upon proper release and delivery of this Policy.

The cash value will be increased by the full reserve on any dividend additions and diminished by any existing indebtedness; the amount of paid-up insurance shall be increased or diminished in the same proportion as such cash value is increased or diminished; or the extended insurance shall be for the face amount of this Policy less any indebtedness, and for such a term as such adjusted cash value will provide.

The Company shall have the right to defer the payment of any surrender value of this Policy (unless for the purpose of paying premiums on policies in this Com-

pany) for a period of not exceeding ninety (90) days from the date of the application therefor.

The reserve basis of the following table is the American Experience Table of Mortality with interest at 3 per cent. per annum, according to the net level premium method.

Table of Extended Insurance, Paid-up Insurance, and Loan or Cash Values provided for by this Policy

At End of Year	Term of Automatic Extended Insurance Without Participation		These Values are for \$1000 Insurance For this Policy multiply by FIFTEEN Participating Paid-Up Life Insurance On Surrender		Loan or Cash Surrender Values
	Years	Days	Participating Paid-Up Life Insurance On Surrender	Loan or Cash Surrender Values	Loan or Cash Surrender Values
3d	4 years	72 days	\$ 84	\$ 35	17
4th	5 "	241 "	111	47	60
5th	7 "	47 "	139	60	39
6th	8 "	208 "	166	73	54
7th	9 "	344 "	193	87	05
8th	11 "	75 "	220	100	94
9th	12 "	121 "	246	115	19
10th	13 "	115 "	272	129	83
11th	14 "	56 "	298	144	86
12th	14 "	313 "	324	160	27
13th	15 "	158 "	349	176	05
14th	15 "	329 "	374	192	20
15th	16 "	96 "	398	208	72
16th	16 "	197 "	422	225	58
17th	16 "	269 "	446	242	77
18th	16 "	316 "	469	260	25
19th	16 "	340 "	491	278	00
20th	16 "	343 "	513	296	00
25th	16 "	136 "	615	388	81
30th	15 "	66 "	701	483	60

Loans are available during the policy-year as provided in Section 2.



SECTION 4. TOTAL AND PERMANENT DISABILITY BENEFITS; WAIVER OF PREMIUM AND MONTHLY INCOME PAYMENT

MONTHLY INCOME PAYMENT. If the insured shall become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the Company will pay to the insured a monthly income equal to one per cent. of the face amount of this Policy (exclusive of any dividend additions). Said income shall start upon the date of receipt by the Company at its Home Office during the insured's lifetime of due proof of total and permanent disability and continue thereafter for the period of the said total disability of the insured prior to the maturity of this Policy. Interest on any indebtedness under this Policy may be deducted from the monthly income payments hereunder.

WAIVER OF PREMIUM. The Company will waive the payment of any premium falling due after receipt of due proof of total and permanent disability and during the continuance of the said total disability of the insured.

NO DEDUCTION FOR BENEFITS GRANTED. In any settlement under this Policy the Company shall not make any deduction on account of monthly income payments made or premiums waived.

PARTICIPATION. This Policy shall continue to participate in surplus during the period of said total and permanent disability.

INCREASING VALUES. Policy values shall increase from year to year in the same manner as though any premiums waived hereunder had been duly paid in cash.

TOTAL AND PERMANENT DISABILITY. Disability shall be total and permanent if the insured is, upon the receipt of due proof, totally and permanently prevented by bodily injury or disease from engaging in any occupation whatever for remuneration or profit and became so disabled while this Policy was in force by payment of premium. Immediately upon receipt of due proof of such total and permanent disability, the benefits shall become effective, subject to the conditions herein provided. If said total disability has been continuous for not less than three consecutive months immediately preceding the receipt of due proof, such disability, if not already approved as permanent, shall nevertheless be deemed to be permanent and upon the receipt of due proof of such disability the benefits shall become effective, subject to the conditions herein provided.

RECOGNIZED DISABILITIES. Without prejudice to any other cause of disability, the Company will recognize the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, as total and permanent disability.

RECOVERY FROM DISABILITY. The Company, at any time until Disability Benefits have been effective for two full years, and not oftener than once a year thereafter, may require of the insured due proof of the continuance of such total disability. Upon failure to furnish such proof, or if it appear at any time that the insured has engaged or has become able to engage in any occupation whatever for remuneration or profit, all Dis-

ability Benefits under this Policy, except in the case of recognized disabilities hereinbefore mentioned, shall thereupon cease.

TERMINATION. This provision for Total and Permanent Disability Benefits shall automatically terminate:

(1) Upon default in the payment of any premium;

(2) If this Policy be surrendered for its cash value, or if any paid-up insurance or extended insurance provided for in Section 3 of this Policy become effective;

(3) Upon the policy anniversary on which the age of the insured at nearest birthday is sixty years, or if this Policy mature prior to such policy anniversary, then upon such maturity;

(4) If the insured engage in Military or Naval Service in time of war;

(5) If the disability of the insured result from aeronautic or submarine casualty;

(6) If the disability of the insured be voluntarily self-inflicted.

Upon termination under (4), (5), or (6) above, the liability of the Company under this Total and Permanent Disability Benefits provision shall be limited to the amount of the current unearned premium for such benefits, which shall be returned by the Company upon notice.

Upon any termination of this provision for Disability Benefits, or upon receipt by the Company of proper request for discontinuance thereof, accompanied by this Policy for endorsement, any premium thereafter due shall be reduced by the amount payable for the Disability Benefits stated on the first page of this Policy.

## Exhibit B

## SECTION 5. DOUBLE INDEMNITY BENEFIT

The Company will pay a Double Indemnity Benefit equal to and in addition to the face amount of this Policy, upon receipt of due proof that the death of the insured resulted solely from bodily injuries effected directly and exclusively by external, violent and accidental means, and that such death occurred within sixty days after sustaining such injuries. This Double Indemnity Benefit shall not be payable if the death of the insured resulted directly or indirectly from illness or disease of any kind or from physical or mental infirmity; from poison administered whether accidentally or intentionally by the insured or by another; from self-destruction at any time whether sane or insane; from any violation of law by the insured; from aeronautic or submarine casualty; or if the injuries were sustained while performing Military or Naval Service in time of war or riot, or while performing police duty as a member of any Military or Naval or Police organization. The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law.

This provision for Double Indemnity Benefit shall automatically terminate:

- (1) Upon default in the payment of any premium;
- (2) If this Policy be surrendered for its cash value, or if any paid-up insurance or extended insurance provided for in Section 3 of this Policy become effective;

- (3) Upon the policy anniversary on which the age of the insured at nearest birthday is seventy years, or if this Policy mature prior to such policy anniversary, then upon such maturity.

Upon any termination of this provision for Double Indemnity Benefit or upon receipt by the Company of proper request for discontinuance thereof, accompanied by this Policy for endorsement, any premium thereafter due shall be reduced by the amount payable for the Double Indemnity Benefit stated on the first page of this Policy.

## SECTION 6. CHANGE OF BENEFICIARY AND ASSIGNMENT

**CHANGE OF BENEFICIARY.** Whenever the right to change the beneficiary has been reserved in this Policy or in the last Designation of Beneficiary recorded at the Home Office of the Company, the insured or his duly appointed guardian if he be not of legal age (subject to any previous assignment of this Policy duly filed at the Home Office) shall have full power while this Policy is in force to designate a new beneficiary, with or without reserving the right of future designation, by filing written notice thereof at the Home Office and such change shall take place upon such filing and not before.

Furthermore whenever such right to change has been reserved, the insured shall be entitled without the consent of the beneficiary, to any cash dividends declared on this Policy and to the loan or cash value or paid-up insurance herein provided for.

**ASSIGNMENT.** Any assignment of this Policy shall be furnished to the Company and a duplicate thereof attached hereto. No assignment shall impose any obligation on this Company until the original thereof has been filed at the Home Office of the Company, nor does the Company guarantee the sufficiency or validity of any assignment.



## SECTION 7. PAYMENT OF PREMIUMS

PAYMENT OF PREMIUMS. All premiums are due and payable in advance at the Home Office of the Company in the City of Philadelphia, or they may be paid to agents on or before the dates when due in exchange for receipts signed by the President, a Vice-President, Secretary, Treasurer, or Actuary and countersigned by the agent.

The insurance under this Policy is based upon annual premiums payable in advance; but on any anniversary, upon written request, payments may be made semi-annually or quarterly in advance at the premium rates therefor now in use by the Company. Any unpaid portion of the premium for the policy-year during which the death of the insured occurs will be deducted from the sum payable under this Policy.

GRACE IN PAYMENT OF PREMIUMS. A grace of thirty-one days, during which this Policy shall remain in force, will be granted for the payment of premiums or regular instalments thereof, after the first. If the death of the insured occur during the days of grace, the sum necessary to complete payment of premium for the then current policy-year will be deducted from the amount payable hereunder.

REINSTATEMENT. In the event of default in premium payments, unless the cash value has been duly paid, this Policy may be reinstated at any time upon evidence of insurability satisfactory to the Company and the payment of all overdue premiums and the payment or reinstatement of any other indebtedness to the Company upon said Policy, with interest at the rate of 6 per cent. per annum.



## SECTION 8. OTHER PROVISIONS

INCONTESTABILITY. This Policy and the application therefor, a copy of which is attached hereto, constitute the entire contract between the parties. This Policy shall be incontestable after it has been in force during the lifetime of the insured for a period of one year from its date of issue except for non-payment of premiums and except as to provisions relating to Disability and Double Indemnity Benefits. All statements made by the insured or on his behalf shall, in the absence of fraud, be deemed representations and not warranties and no such statement shall avoid or be used in defense under this Policy unless it is contained in the written and printed application and a copy of such application is attached to this Policy when issued.

AGE. Any error in stating the age of the insured shall be adjusted by the Company paying under any of the provisions of this Policy such amount as the premium actually paid would have purchased at the correct age.

SUICIDE. If the insured, whether sane or insane, shall commit suicide within one year from the date of issue of this Policy, the liability of the Company shall be limited to the amount of the premium paid hereon.

ALTERATIONS. No alteration of this Policy, or waiver of any of its conditions shall be valid unless endorsed hereon and signed by an Officer of the Company. No agent is authorized to modify, alter or enlarge this contract or to bind the Company by any promise or undertaking as to distribution of surplus or any future award of interest.

## SECTION 9. OPTIONS FOR PAYMENT OF THIS POLICY AS AN INCOME

The insured, subject to any designation of beneficiary or assignment of this Policy filed with the Company, as provided in Section 6, may elect in writing that the net proceeds of this Policy at maturity, or any part thereof, or the cash value before maturity, not less than \$1,000, shall be payable according to any of the following options. In such written election no beneficiary entitled to the proceeds of this Policy or any part thereof or any instalment of interest or principal to become due thereon shall have the right to commute, withdraw, surrender, encumber, alienate or assign the same upon any terms whatsoever unless by the written permission of the insured.

The beneficiary entitled to receive the net proceeds when payable, may elect in writing to have the net proceeds payable according to any of the following options, in event of the failure of the insured to do so.

The tables under Options A, B and C are based upon a policy the net proceeds of which are \$1,000, and apply pro rata to this Policy, and provide for annual or monthly instalments, first instalment to be paid at maturity or upon proper surrender for cash value. The income may be made payable in equivalent equal semi-annual or quarterly instalments upon proper request; to find the semi-annual instalment, multiply the annual instalment by .5037 and to find the quarterly instalment multiply by .2528.

OPTION A. INCOME FOR ONE TO THIRTY YEARS CERTAIN in annual or monthly instalments as may be elected according to the following table.

Number of Years	1	2	3	4	5	6	7	8
Annual	1000.00	507.39	343.23	261.19	211.99	179.22	155.83	138.31
Monthly	84.50	42.87	29.00	22.07	17.91	15.14	13.17	11.69

Number of Years	9	10	11	12	13	14	15	16
Annual	124.69	113.82	104.93	97.54	91.29	85.95	81.33	77.29
Monthly	10.54	9.62	8.87	8.24	7.71	7.26	6.87	6.53

Number of Years	17	18	19	20	21	22	23	24
Annual	73.74	70.59	67.78	65.26	62.98	60.92	59.04	57.33
Monthly	6.23	5.96	5.73	5.51	5.32	5.15	4.99	4.84

Number of Years	25	26	27	28	29	30
Annual	55.76	54.31	52.97	51.74	50.60	49.53
Monthly	4.71	4.59	4.48	4.37	4.28	4.19

OPTION B. INCOME FOR TWENTY YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	39.52	39.70	39.89	40.08	40.28	40.49	40.71	40.94
Monthly	3.34	3.35	3.37	3.39	3.40	3.42	3.44	3.46
Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	41.18	41.43	41.69	41.96	42.24	42.53	42.84	43.16
Monthly	3.48	3.50	3.52	3.55	3.57	3.59	3.62	3.65
Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	43.49	43.84	44.21	44.59	44.98	45.39	45.82	46.27
Monthly	3.67	3.70	3.74	3.77	3.80	3.84	3.87	3.91
Age of Beneficiary	34	35	36	37	38	39	40	
Annual	46.74	47.23	47.73	48.26	48.80	49.36	49.95	
Monthly	3.95	3.99	4.03	4.08	4.12	4.17	4.22	
Age of Beneficiary	41	42	43	44	45	46	47	48
Annual	50.55	51.17	51.81	52.46	53.12	53.80	54.50	55.19
Monthly	4.27	4.32	4.38	4.43	4.49	4.55	4.61	4.66
Age of Beneficiary	49	50	51	52	53	54	55	56
Annual	55.89	56.59	57.29	57.98	58.66	59.33	59.97	60.58
Monthly	4.72	4.78	4.84	4.90	4.96	5.01	5.07	5.12
Age of Beneficiary	57	58	59	60	61	62	63	64
Annual	61.17	61.72	62.24	62.71	63.15	63.54	63.89	64.19
Monthly	5.17	5.22	5.26	5.30	5.34	5.37	5.40	5.42
Age of Beneficiary	65	66	67	68	69	70 and over		
Annual	64.45	64.67	64.85	64.99	65.09	65.16		
Monthly	5.45	5.46	5.48	5.49	5.50	5.51		

OPTION C. INCOME FOR TEN YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	40.62	40.81	41.01	41.23	41.45	41.68	41.92	42.17
Monthly	3.43	3.45	3.47	3.48	3.50	3.52	3.54	3.56
Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	42.43	42.70	42.99	43.29	43.60	43.93	44.27	44.63
Monthly	3.59	3.61	3.63	3.66	3.68	3.71	3.74	3.77
Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	45.01	45.40	45.81	46.25	46.70	47.19	47.69	48.22
Monthly	3.80	3.84	3.87	3.91	3.95	3.99	4.03	4.07
Age of Beneficiary	34	35	36	37	38	39	40	41
Annual	48.77	49.36	49.98	50.63	51.31	52.01	52.74	53.51
Monthly	4.12	4.17	4.22	4.28	4.34	4.39	4.46	4.52
Age of Beneficiary	42	43	44	45	46	47	48	49
Annual	54.27	55.06	55.90	56.78	57.71	58.69	59.72	60.79
Monthly	4.59	4.65	4.72	4.80	4.88	4.96	5.05	5.14
Age of Beneficiary	50	51	52	53	54	55	56	57
Annual	61.92	63.09	64.32	65.60	66.93	68.31	69.73	71.20
Monthly	5.23	5.33	5.44	5.54	5.66	5.77	5.89	6.02
Age of Beneficiary	58	59	60	61	62	63	64	65
Annual	72.72	74.27	75.85	77.45	79.07	80.70	82.32	83.93
Monthly	6.14	6.28	6.41	6.54	6.68	6.82	6.96	7.09
Age of Beneficiary	66	67	68	69	70	71	72	73
Annual	85.52	87.07	88.57	90.02	91.40	92.70	93.91	95.02
Monthly	7.23	7.36	7.48	7.61	7.72	7.83	7.94	8.03
Age of Beneficiary	74	75	76	77	78	79	80 and over	
Annual	96.02	96.90	97.76	98.59	99.38	100.02	100.52	
Monthly	8.11	8.19	8.26	8.33	8.40	8.45	8.49	

The income under Option A or the income during the instalments-certain period under Option B or C, after the first year, will be increased annually by such surplus as may be awarded by the Board of Trustees. Upon the death of any beneficiary, any unpaid instalments under Option A or unpaid instalments-certain under Option B or C, or the commuted value thereof, calculated upon the basis of 3 per cent. per annum compound interest, will be paid as agreed upon in the election of the option.

Options B and C are based on the age of the beneficiary at last birthday and are not available when an association, firm or corporation is beneficiary or assignee.

OPTION D. INTEREST INCOME ON THE NET PROCEEDS payable for such a period as may be agreed upon in the election of this option.

OPTION E. INCOME OF A FIXED AMOUNT PAYABLE UNTIL THE NET PROCEEDS AND INTEREST PAYMENTS TO BE ADDED THERETO ARE EXHAUSTED, the final payment to be the balance then remaining with the Company.

Under Options D and E, the net proceeds are left with the Company at interest at the rate of 3 per cent. per annum, increased annually by such additions as may be awarded by the Board of Trustees, and the income may be made payable annually or in equivalent equal semi-annual, quarterly or monthly payments commencing at the end of the first interest period, with a further payment for the period elapsing between the last regular payment and the date of death of the beneficiary. Payments of principal and interest shall be subject to such provisions as may be agreed upon in the election of either of these options.

Exhibit B



[Stamped on face]: Disability Claim Examined.

1191014  
No.Ed. 3-24

APPLICATION FOR INSURANCE IN  
THE PENN MUTUAL LIFE INSURANCE COMPANY  
OF PHILADELPHIA, PA.

1 A. Name in Full (please print)  
James McCulloch Jr.

B. Residence Address

No. Street City County State  
4275 Ingleside Ave, San Diego, Calif.

C. If in County

.....Miles.... Direction How Long Have  
R.F.D. From Above City. You Resided at  
Present Address? 9 Years

D. Business Address

No. Street City County State  
914 Beech San Diego, Calif

E. Send Premium Notices to  
914 Beech St. San Diego, Calif.

4 A. When and Where Were you  
Born?

Place County State  
Baltimore Md.

B. Day Month Year Age Nearest  
6 Dec. 1893 Birthday  
32

5. Are You (Indicate by X)  
Married X Single..... Widower....  
Widow.....

6 A. What Other Insurance Have You  
on Your Life?

Company Amount  
Metropolitan 20 Pay Life 16,000.00  
Acasia " " 5,000.00

- F. If Married Woman, Give Maiden Name Husband's Name
- G. Places of Residence Last Five Years San Diego, Calif.
- H. Do You Intend to Change Residence or Travel Outside the U. S.? (Give Details) No.
- I. Are You Engaged in Military or Naval Service? Do You Intend so to Engage? No No
- J. Are You Engaged in Aeronautics or Submarine Service? Do You Intend so to Engage? No No
- 2 A. Occupation (State Kind of Business) Proprietor and Superintendent of Hospital McCulloch
- B. Occupation During the Last Five Years As Above
- C. Any Change of Occupation Contemplated, Either Temporary or Permanent? (Give Details) No No

- B. Have You Ever Applied to Any Company or Agent Without Receiving a Policy of the Exact Kind and Amount Applied for? No
- C. Are Any Applications Now Pending (Give Details) No
- 7 A. Sum to Be Insured \$10,000.00 B. Plan OLR
- C. Premiums Payable V/Annually Semi-Annually Quarterly
- D. If Disability Benefits Desired, Indicate by X  
 Disability Waiver  
 of Premium ....  
 Disability Waiver of Premium and Annuity X  
 Double Indemnity X
- 8. How is Surplus to Be Used? (Rule out Those Not Desired)  
 To Reduce Premiums  
 To Increase Amount Insured

To Accumulate at 3% Interest  
√To Accelerate Maturity

9. What Settlement, If Any, Was Effected for Premium on Policy Hereby Applied For? Note

Remarks (Use This Space for Beneficiary Provisions, Preliminary Term Premiums, Etc.)

3 A. To Whom Shall Policy Be Made Payable?  
Anna R. McCulloch  
If Said Beneficiary Outlives me, Otherwise to My Estate

B. Address San Diego, Cal. C. Relationship  
4275 Ingleside Ave. Wife

D. Beneficiary's Date of Birth E. Do you Reserve the Right to Change Beneficiary?  
June 1st, 1893 Yes

F. If Beneficiary Is Married Woman, State Husband's Name  
Maiden Name Rogan

For Home Office Endorsements Only

[On Margin]: NOTICE—THE FULL NAMES of all persons must be written and signed plainly and distinctly. Names must not be abbreviated. Every question must be fully answered. When a Creditor insures the life of a Debtor, both must sign.

My statements and answers to the questions printed above, and my statements and answers made and given to the Company's Medical Examiner, are full, complete and true. Upon them I base my application for insurance, and agree that they shall be regarded as a part of

the contract if and when issued. If the premium on the insurance herein applied for is not paid at the time of making this application, the contract of insurance shall not be in force unless or until a policy shall be issued and delivered to me and the first premium thereon actually paid during my lifetime and good health. If settlement is effected in accordance with the attached receipt at the time of making this application, the policy shall be in force as of the date of such settlement, provided the application is approved by the Company at the Home Office. The policy if and when issued and delivered to me, shall be in the form now in use by the Company. I understand that neither agents nor examiners have any authority to modify, alter or enlarge contracts. The foregoing agreements and declarations are made on behalf of myself and of any beneficiary under any policy on my life issued by the Company upon this application. 130473 to 130475

My acceptance of any policy issued on this application will constitute a ratification by me of any correction in or addition to this application made by the Company and noted in the space provided for "Home Office Endorsements Only."

In Witness Whereof, the applicant has hereunto subscribed his name. Dated at San Diego the 29 day of September 1925

Witness Present:

Don C. Carrell

Signature of the person  
proposed for insurance.....  
Sign the Names in full.

James McCulloch, Jr.

No. 434230

QUESTIONS TO BE ANSWERED BY THE PERSON TO BE INSURED

Name of Applicant James McCulloch Jr. Examined 11 A. M. This 30th Day of Sept. 1925.  
 (Write name in printed letters)

At San Diego, County of San Diego State of Calif. Residence 4275 Ingleside

Do you Contemplate Any Change of Residence or Occupation? No Date of Birth? Dec. 6, 1893 Name of Agent? D. C. Carrell Henking & Randolph

Age if Living	State of Health	Age at Death	Cause of Death	Duration of Fatal Illness
---------------	-----------------	--------------	----------------	---------------------------

10. A.

Father

89 Good

Mother

57

(Gall Bladder)

Full Brothers {

How Many Living 2 17-29 Both  
 " " Dead? 0 Good

3 days

Full Sisters {

How Many Living 1 27 Good  
 " " Dead 0

Wife or Husband's

State of Health Good

Age at Death

Cause of Death

Age If Living 31

Ages Attained:

Father's

Father D.K.

Father's

Mother D.K.

Mother's

Father D.K.

Mother's

Mother D.K.

(B) Has any near relative, uncles, aunts and grandparents included, had tuberculosis (consumption), cancer, apoplexy or Bright's disease. Explain fully. If the family history shows a lack of longevity, give number and ages of uncles and aunts. See Note 6.

- |  |                                      |                     |                              |
|--|--------------------------------------|---------------------|------------------------------|
| 11 A. Are you now in good health?  | A. Yes.                              | B. 1920.            | C. Crushed lt. middle finger |
| were you last attended by a physician or consulted one?  |                                      |                     |                              |
| D. Give details in full.   | D. Caught finger in bearing of auto. |                     |                              |
| E. Give name and residence of the physician who attended you.  | E. Dr. Mott Arnold.                  | Front & Spruce      |                              |
| F. Give name and residence of your medical adviser, or family physician, to whom you now refer for a certificate, if deemed necessary. | F. None                              | Sts., City          |                              |
| G. Has any physician ever given an unfavorable opinion of your insurability after either a formal or an informal examination?          | G. No                                |                     |                              |
| H. Has any physician ever advised you to try a change of climate?  | H. No                                |                     |                              |
| 12. A. Have you ever been ruptured?  | A. No                                | B. No               |                              |
| you a hernia now?  | C. —                                 | D. Yes—if necessary |                              |
| C. If so, do you now wear a suitable truss?  |                                      |                     |                              |
| D. Do you agree to wear one while insured in this company?   |                                      |                     |                              |
| Note 7.  |                                      |                     |                              |



13. A. Do you now use intoxicating liquors?  
 B. To what extent?  
 C. Have you ever used intoxicating liquors to excess? If so, explain the duration and extent of excess, and when last.  
 D. Have you ever taken a cure for inebriety? Note 6.
14. Have you ever used opium, morphia, chloral or any narcotic, unless regularly prescribed by a physician? If so, explain fully.
15. A. Have you had insanity, apoplexy, palsy, vertigo, convulsions, sunstroke, congestion, inflammation, or any other disorder of the brain or nervous system?  
 B. Have you had asthma, consumption, spitting of blood, habitual cough and expectoration, palpitation, or any disease of the throat, heart or lungs?  
 C. Have you had appendicitis, indigestion, biliousness, cancer, or any tumor, pelagra, chronic diarrhoea, ear discharge, dropsy, fistula, gall-stones or gravel,
- A. No  
 B. None  
 C. No  
 D. No  
 A. No  
 B. No  
 C. No

renal or hepatic colic, open sores, inflammatory rheumatism, gout, syphilis or stricture, or any disease of the liver, kidneys, or bladder? Notes 8 and 9.

D. Have you any defect in hearing, in vision of either eye, any malformation or varicose veins?

D. No

E. Are you now, or have you recently been associated with a person who has or has had consumption?

E. No

16. Have you ever had illness, disease, injury or operation other than as stated by you above? If so, give full particulars, date, duration, severity, etc., of each. Use reverse side if necessary.

Yes, fract. rt. forearm—both bones above wrist—complete recovery.

I Hereby Agree, That all the foregoing statements and answers, made to the Company's Medical Examiner, are a part of my application for insurance, are declared to be full, complete and true, and are offered to the Company as a consideration for the Contract.

Witnessed by  
the Examiner

Signature of the person  
proposed for insurance

H. S. Anderton, M. D.

James McCulloch, Jr.

[On Cover]: COPY

No.....

THE  
PENN MUTUAL LIFE  
INSURANCE COMPANY  
PHILADELPHIA

NAME OF INSURED  
JAMES MCCULLOCH, JR.

ORDINARY LIFE RATE  
ENDOWMENT POLICY

ANNUAL DIVIDENDS  
DOUBLE INDEMNITY BENEFIT  
TOTAL AND PERMANENT  
DISABILITY BENEFITS

PROVIDING FOR  
WAIVER OF PREMIUM AND  
MONTHLY INCOME PAYMENT

Amount, \$15,000.00

Date of Policy, November 27th, 1925

Yearly Payment, \$413.40  
During the Continuance of this Policy  
Payable.....Annually  
Due the 27th day of November

## EXHIBIT C

Copy

NUMBER	THE PENN MUTUAL (Emblem)	AMOUNT
.....		5,000.00

“We are met on the broad pathway of  
good faith and good will.”

LIFE INSURANCE COMPANY  
OF PHILADELPHIA

Hereby insures the life of  
JAMES MCCULLOCH JR.  
THE INSURED

and agrees to pay  
FIVE THOUSAND Dollars,

whenever the reserve on this Policy (according to the Ordinary Life Plan and the American Experience Table of Mortality with interest at 3 per cent.), together with the accumulated surplus then to the credit of this Policy, shall equal the face amount, to James McCulloch, Jr., the insured, which payment shall be in full settlement of all demands against the said Company under this Policy; or if the said insured should die before this Policy matures as above provided, then to pay the said face amount, together with the accumulated surplus to Anna R. McCulloch, his wife, if she survive him, otherwise to his executors, administrators or assigns,

### THE BENEFICIARY

upon receipt of due proof of the death of the insured and delivery of this Policy.

The right to change the beneficiary is reserved by the insured.

### DISABILITY BENEFITS

The Company agrees to waive payment of subsequent premiums upon receipt of due proof that the insured has become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years as provided in section four.

### DIVIDENDS

Dividends of Surplus under this Policy shall be awarded and may be used as provided in section one.

### FULL PAID OPTION

When at the expiration of any policy-year, the accumulated surplus to the credit of this Policy, together with its guaranteed cash surrender value as specified on the second page hereof, shall equal or exceed the net single premium required at the attained age of the insured to make this Policy full-paid, such net single premium to be calculated on the same bases as the net yearly premium on this Policy, then upon proper written application it will be declared a full-paid policy and will participate annually thereafter as such and any excess of these dividends over the amount required for the purpose above described shall then be paid in cash.

## PREMIUMS

This contract is made in consideration of the payment in advance to the Company at its Home Office of the sum of One Hundred Twenty-two & 50/100 Dollars, at the date hereof, and upon condition that the annual premium of One Hundred Twenty-two & 50/100 Dollars is paid on or before the Twenty-seventh day of November in every year until the maturity of this Policy, subject to waiver of payment of premiums in event of total and permanent disability.

The annual premium stated above includes One & 80/100 Dollars for the Total and Permanent Disability Benefits and shall be correspondingly reduced upon any termination of such Benefits as provided in section four.

Premium payments may be made annually, or in semi-annual or quarterly instalments at the rates shown on the margin hereof and as provided in section six.

All the benefits, privileges and provisions stated on the second and third pages hereof form a part of this Policy as fully as though recited at length over the signatures hereto affixed.

IN WITNESS WHEREOF, THE PENN MUTUAL LIFE INSURANCE COMPANY of Philadelphia has caused this Policy to be signed by its President, Secretary and Actuary, attested by its Registrar, at its Home Office in Philadelphia, Pennsylvania, on the date of issue, the Twenty-seventh day of November 1925.

Sydney A Smith Secretary.      Wm A Law President.

Attest:

.....Registrar.      J. Burnett Gibb Actuary.



ORDINARY LIFE RATE ENDOWMENT POLICY—ANNUAL DIVIDENDS—TOTAL AND PERMANENT DISABILITY BENEFITS PROVIDING FOR WAIVER OF PREMIUM.

AGE 32

ANNUAL PREMIUM \$122.50

SEMI-ANNUAL PREMIUM \$62.50

QUARTERLY PREMIUM \$31.85

Examined by M. C. F.

made from Home Office records

I hereby certify that this is a ~~true~~ copy <sup>^</sup> of Policy No. 1196773 issued by The Penn Mutual Life Ins. Co. on the Life of "James McCulloch, Jr."

-----  
Asst Supervisor of Applications  
and Death Claims

Policy Form No. 6M-01 O. L. R. E. W. P. Ed. 6,  
1924.

Exhibit C

FROM THE DATE OF ISSUE THIS POLICY SHALL BE WITHOUT ANY RESTRICTIONS AS TO TRAVEL OR RESIDENCE

SECTION 1. PARTICIPATION—DIVIDENDS  
OF SURPLUS

ANNUAL DIVIDENDS. This Policy will participate in surplus while in force by payment of premiums or by waiver of premiums as provided in Section 4. Dividends will be determined and accounted for by the Company and will be available upon payment of the

second year's premium, and at the end of the second and of each subsequent policy-year.

All distributions of surplus awarded to this Policy and remaining in the hands of the Company shall be accumulated at four per cent. per annum, compound interest, or the average net rate realized by the Company upon its assets if it be less; this surplus and interest, increased annually by such addition as may be awarded by the Board of Trustees, will be used to mature this Policy as an Endowment, as provided on the first page hereof, or in event of the death of the insured during the continuance in full force of this Policy, the accumulated surplus will be paid in addition to the face amount of this Policy.

Any accumulated surplus to the credit of this Policy may either be drawn in cash, or used in reduction of premium, or applied to increase the paid-up insurance provided for by the terms of this Policy by the amount of similar paid-up life insurance which the accumulated surplus would purchase at the attained age of the insured according to the present established rates of the Company, provided, however, that if such paid-up insurance shall exceed the face amount of this Policy, satisfactory evidence of insurability must first be furnished to the Company.

If no other option is selected, dividends shall be paid in cash.

POST-MORTEM DIVIDEND. Upon the death of the insured during any policy-year, after the first, while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4, the Company will pay a post-mortem dividend for the policy-year current at the date of the insured's death.

#### SECTION 2. POLICY LOANS

Loans will be available during the third policy-year, if three years' premiums have been paid, and at any time

thereafter while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4 and may be obtained on proper assignment and delivery of this Policy and on the sole security hereof.

The amount of such loan may be any sum which with interest to the end of the current policy-year will not exceed the cash value at the end of such year less any existing indebtedness on this Policy and any unpaid balance of the current policy-year's premium. The cash value will be the full reserve on this Policy as provided in Section 3 and will be increased by the full reserve on any dividend additions.

The indebtedness or any part thereof may be repaid to the Company at any time.

Interest on loans will be at the rate of 6 per cent. per annum payable at the end of each policy-year. If not paid when due it shall be added to the existing indebtedness provided the total indebtedness on this Policy would not then exceed the cash value plus the full reserve on any dividend additions, and the indebtedness thus created shall bear interest at the same rate.

Failure to repay any such loans or interest thereon shall not void this Policy unless the total indebtedness hereon with interest shall equal or exceed the cash value plus the full reserve on any dividend additions, nor until one month after notice shall have been mailed to the last-known address of the insured and of the assignee, if any, of record at the Home Office of the Company. All indebtedness on account of this Policy, with accrued interest, shall be deducted from any settlement hereunder. The Company shall have the right to defer the making of a loan hereon (unless for the purpose of paying premiums on policies in this Company) for a period of not exceeding ninety (90) days from the date of the application therefor.

### SECTION 3. POLICY VALUES— NON-FORFEITURE IN EVENT OF LAPSE

The full reserve on this Policy will be available upon lapse through non-payment of premiums at the end of the third policy-year or at any time thereafter, and may be used as follows:

- (1) To extend automatically the face amount of of this Policy as Term Insurance without participation; or,
- (2) To purchase paid-up participating life insurance upon proper written application within one month from the date of lapse; or,
- (3) To pay the cash value of this Policy upon proper release and delivery of this Policy within one month from the date of lapse.

The following table states such values for completed policy years. These values will be correspondingly increased for any fractional part of a year's premium which has been paid.

The full reserve on any paid-up insurance or extended insurance, less any indebtedness thereon, will be available as a cash value at any time upon proper release and delivery of this Policy.

The cash value will be increased by the full reserve on any dividend additions and diminished by any existing indebtedness; the amount of paid-up insurance shall be increased or diminished in the same proportion as such cash value is increased or diminished; or the extended insurance shall be for the face amount of this Policy less any indebtedness, and for such a term as such adjusted cash value will provide.

The Company shall have the right to defer the payment of any surrender value of this Policy (unless for the purpose of paying premiums on policies in this Com-

pany) for a period of not exceeding ninety (90) days from the date of the application therefor.

The reserve basis of the following table is the American Experience Table of Mortality with interest at 3 per cent. per annum, according to the net level premium method.

Table of Extended Insurance, Paid-up Insurance, and Loan or Cash Values provided for by this Policy

At End of Year	Term of Automatic Extended Insurance Without Participation		These Values are for \$1000 Insurance For this Policy multiply by FIVE	
			Participating Paid-Up Life Insurance On Surrender	Loan or Cash Surrender Values
3d	4 years	72 days	\$ 84	\$ 35 17
4th	5 "	241 "	111	47 60
5th	7 "	47 "	139	60 39
6th	8 "	208 "	166	73 54
7th	9 "	344 "	193	87 05
8th	11 "	75 "	220	100 94
9th	12 "	121 "	246	115 19
10th	13 "	115 "	272	129 83
11th	14 "	56 "	298	144 86
12th	14 "	313 "	324	160 27
13th	15 "	158 "	349	176 05
14th	15 "	329 "	374	192 20
15th	16 "	96 "	398	208 72
16th	16 "	197 "	422	225 58
17th	16 "	269 "	446	242 77
18th	16 "	316 "	469	260 25
19th	16 "	340 "	491	278 00
20th	16 "	343 "	513	296 00
25th	16 "	136 "	615	388 81
30th	15 "	66 "	701	483 60

Loans are available during the policy-year as provided in Section 2.

## SECTION 4. TOTAL AND PERMANENT DISABILITY BENEFITS; WAIVER OF PREMIUM

WAIVER OF PREMIUM. If the insured shall become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the Company will waive the payment of any premium falling due after receipt by the Company at its Home Office during the insured's lifetime of due proof of total and permanent disability and will continue to waive payment of premiums for the period of the said total disability of the insured prior to the maturity of this policy.

NO DEDUCTION FOR BENEFITS GRANTED. In any settlement under this Policy the Company shall not make any deduction on account of premiums waived.

PARTICIPATION. This Policy shall continue to participate in surplus during the period of said total and permanent disability.

INCREASING VALUES. Policy values shall increase from year to year in the same manner as though any premiums waived hereunder had been duly paid in cash.

TOTAL AND PERMANENT DISABILITY. Disability shall be total and permanent if the insured is, upon the receipt of due proof, totally and permanently prevented by bodily injury or disease from engaging in any occupation whatever for remuneration or profit and became so disabled while this Policy was in force by pay-



ment of premium. Immediately upon receipt of due proof of such total and permanent disability, the benefits shall become effective, subject to the conditions herein provided. If said total disability has been continuous for not less than three consecutive months immediately preceding the receipt of due proof, such disability, if not already approved as permanent, shall nevertheless be deemed to be permanent and upon the receipt of due proof of such disability the benefits shall become effective, subject to the conditions herein provided.

RECOGNIZED DISABILITIES. Without prejudice to any other cause of disability, the Company will recognize the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, as total and permanent disability.

RECOVERY FROM DISABILITY. The Company, at any time until Disability Benefits have been effective for two full years, and not oftener than once a year thereafter, may require of the insured due proof of the continuance of such total disability. Upon failure to furnish such proof, or if it appear at any time that the insured has engaged or has become able to engage in any occupation whatever for remuneration or profit, all Disability Benefits under this Policy, except in the case of recognized disabilities hereinbefore mentioned, shall thereupon cease.

TERMINATION. This provision for Total and Permanent Disability Benefits shall automatically terminate:

- (1) Upon default in the payment of any premium;
- (2) If this Policy be surrendered for its cash value, or if any paid-up insurance or extended insurance provided for in Section 3 of this Policy become effective;
- (3) Upon the policy anniversary on which the age of the insured at nearest birthday is sixty years, or if this Policy mature prior to such policy anniversary, then upon such maturity;
- (4) If the insured engage in Military or Naval Service in time of war;
- (5) If the disability of the insured result from aeronautic or submarine casualty;
- (6) If the disability of the insured be voluntarily self-inflicted.

Upon termination under (4), (5), or (6) above, the liability of the Company under this Total and Permanent Disability Benefits provision shall be limited to the amount of the current unearned premium for such benefits, which shall be returned by the Company upon notice.

Upon any termination of this provision for Disability Benefits, or upon receipt by the Company of proper request for discontinuance thereof, accompanied by this Policy for endorsement, any premium thereafter due shall be reduced by the amount payable for the Disability Benefits stated on the first page of this Policy.

## Exhibit C

SECTION 5. CHANGE OF BENEFICIARY AND  
ASSIGNMENT

CHANGE OF BENEFICIARY. Whenever the right to change the beneficiary has been reserved in this Policy or in the last Designation of Beneficiary recorded at the Home Office of the Company, the insured or his duly appointed guardian if he be not of legal age (subject to any previous assignment of this Policy duly filed at the Home Office) shall have full power while this Policy is in force to designate a new beneficiary, with or without reserving the right of future designation, by filing written notice thereof at the Home Office and such change shall take place upon such filing and not before.

Furthermore whenever such right to change has been reserved, the insured shall be entitled without the consent of the beneficiary, to any cash dividends declared on this Policy and to the loan or cash value or paid-up insurance herein provided for.

ASSIGNMENT. Any assignment of this Policy shall be furnished to the Company and a duplicate thereof attached hereto. No assignment shall impose any obligation on this Company until the original thereof has been filed at the Home Office of the Company, nor does the Company guarantee the sufficiency or validity of any assignment.

## SECTION 6. PAYMENT OF PREMIUMS

PAYMENT OF PREMIUMS. All premiums are due and payable in advance at the Home Office of the Company in the City of Philadelphia, or they may be paid to agents on or before the dates when due in exchange for receipts signed by the President, a Vice-President, Secretary, Treasurer, or Actuary and countersigned by the agent.

The insurance under this Policy is based upon annual premiums payable in advance; but on any anniversary, upon written request, payments may be made semi-annually or quarterly in advance at the premium rates therefor now in use by the Company. Any unpaid portion of the premium for the policy-year during which the death of the insured occurs will be deducted from the sum payable under this Policy.

GRACE IN PAYMENT OF PREMIUMS. A grace of thirty-one days, during which this Policy shall remain in force, will be granted for the payment of premiums or regular instalments thereof, after the first. If the death of the insured occur during the days of grace, the sum necessary to complete payment of premium for the then current policy-year will be deducted from the amount payable hereunder.

REINSTATEMENT. In the event of default in premium payments, unless the cash value has been duly paid, this Policy may be reinstated at any time upon evidence of insurability satisfactory to the Company and the payment of all overdue premiums and the payment or reinstatement of any other indebtedness to the Company upon said Policy, with interest at the rate of 6 per cent. per annum.

## SECTION 7. OTHER PROVISIONS

INCONTESTABILITY. This Policy and the application therefor, a copy of which is attached hereto, constitute the entire contract between the parties. This Policy shall be incontestable after it has been in force during the lifetime of the insured for a period of one year from its date of issue except for non-payment of premiums and except as to provisions relating to Disability and Double Indemnity Benefits. All statements made by the insured or on his behalf shall, in the absence of fraud, be deemed representations and not warranties and no such statement shall avoid or be used in defense under this Policy unless it is contained in the written and printed application and a copy of such application is attached to this Policy when issued.

AGE. Any error in stating the age of the insured shall be adjusted by the Company paying under any of the provisions of this Policy such amount as the premium actually paid would have purchased at the correct age.

SUICIDE. If the insured, whether sane or insane, shall commit suicide within one year from the date of issue of this Policy, the liability of the Company shall be limited to the amount of the premium paid hereon.

ALTERATIONS. No alteration of this Policy, or waiver of any of its conditions shall be valid unless endorsed hereon and signed by an Officer of the Company. No agent is authorized to modify, alter or enlarge this contract or to bind the Company by any promise or undertaking as to distribution of surplus or any future award of interest.

## SECTION 8. OPTIONS FOR PAYMENT OF THIS POLICY AS AN INCOME

The insured, subject to any designation of beneficiary or assignment of this Policy filed with the Company, as provided in Section 6, may elect in writing that the net proceeds of this Policy at maturity, or any part thereof, or the cash value before maturity, not less than \$1,000, shall be payable according to any of the following options. In such written election no beneficiary entitled to the proceeds of this Policy or any part thereof or any instalment of interest or principal to become due thereon shall have the right to commute, withdraw, surrender, encumber, alienate or assign the same upon any terms whatsoever unless by the written permission of the insured.

The beneficiary entitled to receive the net proceeds when payable, may elect in writing to have the net proceeds payable according to any of the following options, in event of the failure of the insured to do so.

The tables under Options A, B and C are based upon a policy the net proceeds of which are \$1,000, and apply pro rata to this Policy, and provide for annual or monthly instalments, first instalment to be paid at maturity or upon proper surrender for cash value. The income may be made payable in equivalent equal semi-annual or quarterly instalments upon proper request; to find the semi-annual instalment, multiply the annual instalment by .5037 and to find the quarterly instalment multiply by .2528.



OPTION A. INCOME FOR ONE TO THIRTY YEARS CERTAIN in annual or monthly instalments as may be elected according to the following table.

Number of Years	1	2	3	4	5	6	7	8
Annual	1000.00	507.39	343.23	261.19	211.99	179.22	155.83	138.31
Monthly	84.50	42.87	29.00	22.07	17.91	15.14	13.17	11.69

Number of Years	9	10	11	12	13	14	15	16
Annual	124.69	113.82	104.93	97.54	91.29	85.95	81.33	77.29
Monthly	10.54	9.62	8.87	8.24	7.71	7.26	6.87	6.53

Number of Years	17	18	19	20	21	22	23	24
Annual	73.74	70.59	67.78	65.26	62.98	60.92	59.04	57.33
Monthly	6.23	5.96	5.73	5.51	5.32	5.15	4.99	4.84

Number of Years	25	26	27	28	29	30
Annual	55.76	54.31	52.97	51.74	50.60	49.53
Monthly	4.71	4.59	4.48	4.37	4.28	4.19

OPTION B. INCOME FOR TWENTY YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	39.52	39.70	39.89	40.08	40.28	40.49	40.71	40.94
Monthly	3.34	3.35	3.37	3.39	3.40	3.42	3.44	3.46
Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	41.18	41.43	41.69	41.96	42.24	42.53	42.84	43.16
Monthly	3.48	3.50	3.52	3.55	3.57	3.59	3.62	3.65
Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	43.49	43.84	44.21	44.59	44.98	45.39	45.82	46.27
Monthly	3.67	3.70	3.74	3.77	3.80	3.84	3.87	3.91
Age of Beneficiary	34	35	36	37	38	39	40	
Annual	46.74	47.23	47.73	48.26	48.80	49.36	49.95	
Monthly	3.95	3.99	4.03	4.08	4.12	4.17	4.22	
Age of Beneficiary	41	42	43	44	45	46	47	48
Annual	50.55	51.17	51.81	52.46	53.12	53.80	54.50	55.19
Monthly	4.27	4.32	4.38	4.43	4.49	4.55	4.61	4.66
Age of Beneficiary	49	50	51	52	53	54	55	56
Annual	55.89	56.59	57.29	57.98	58.66	59.33	59.97	60.58
Monthly	4.72	4.78	4.84	4.90	4.96	5.01	5.07	5.12
Age of Beneficiary	57	58	59	60	61	62	63	64
Annual	61.17	61.72	62.24	62.71	63.15	63.54	63.89	64.19
Monthly	5.17	5.22	5.26	5.30	5.34	5.37	5.40	5.42
Age of Beneficiary	65	66	67	68	69	70 and over		
Annual	64.45	64.67	64.85	64.99	65.09	65.16		
Monthly	5.45	5.46	5.48	5.49	5.50	5.51		

OPTION C. INCOME FOR TEN YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	40.62	40.81	41.01	41.23	41.45	41.68	41.92	42.17
Monthly	3.43	3.45	3.47	3.48	3.50	3.52	3.54	3.56
Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	42.43	42.70	42.99	43.29	43.60	43.93	44.27	44.63
Monthly	3.59	3.61	3.63	3.66	3.68	3.71	3.74	3.77
Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	45.01	45.40	45.81	46.25	46.70	47.19	47.69	48.22
Monthly	3.80	3.84	3.87	3.91	3.95	3.99	4.03	4.07
Age of Beneficiary	34	35	36	37	38	39	40	41
Annual	48.77	49.36	49.98	50.63	51.31	52.01	52.74	53.51
Monthly	4.12	4.17	4.22	4.28	4.34	4.39	4.46	4.52
Age of Beneficiary	42	43	44	45	46	47	48	49
Annual	54.27	55.06	55.90	56.78	57.71	58.69	59.72	60.79
Monthly	4.59	4.65	4.72	4.80	4.88	4.96	5.05	5.14
Age of Beneficiary	50	51	52	53	54	55	56	57
Annual	61.92	63.09	64.32	65.60	66.93	68.31	69.73	71.20
Monthly	5.23	5.33	5.44	5.54	5.66	5.77	5.89	6.02
Age of Beneficiary	58	59	60	61	62	63	64	65
Annual	72.72	74.27	75.85	77.45	79.07	80.70	82.32	83.93
Monthly	6.14	6.28	6.41	6.54	6.68	6.82	6.96	7.09
Age of Beneficiary	66	67	68	69	70	71	72	73
Annual	85.52	87.07	88.57	90.02	91.40	92.70	93.91	95.02
Monthly	7.23	7.36	7.48	7.61	7.72	7.83	7.94	8.03
Age of Beneficiary	74	75	76	77	78	79	80 and over	
Annual	96.02	96.90	97.76	98.59	99.38	100.02	100.52	
Monthly	8.11	8.19	8.26	8.33	8.40	8.45	8.49	

The income under Option A or the income during the instalments-certain period under Option B or C, after the first year, will be increased annually by such surplus as may be awarded by the Board of Trustees. Upon the death of any beneficiary, any unpaid instalments under Option A or unpaid instalments-certain under Option B or C, or the commuted value thereof, calculated upon the basis of 3 per cent. per annum compound interest, will be paid as agreed upon in the election of the option.

Options B and C are based on the age of the beneficiary at last birthday and are not available when an association, firm or corporation is beneficiary or assignee.

OPTION D. INTEREST INCOME ON THE NET PROCEEDS payable for such a period as may be agreed upon in the election of this option.

OPTION E. INCOME OF A FIXED AMOUNT PAYABLE UNTIL THE NET PROCEEDS AND INTEREST PAYMENTS TO BE ADDED THERETO ARE EXHAUSTED, the final payment to be the balance then remaining with the Company.

Under Options D and E, the net proceeds are left with the Company at interest at the rate of 3 per cent. per annum, increased annually by such additions as may be awarded by the Board of Trustees, and the income may be made payable annually or in equivalent equal semi-annual, quarterly or monthly payments commencing at the end of the first interest period, with a further payment for the period elapsing between the last regular payment and the date of death of the beneficiary. Payments of principal and interest shall be subject to such provisions as may be agreed upon in the election of either of these options.

Exhibit C

[Stamped on face]: Disability Claim Examined.

1191014  
No.Ed. 3-24

APPLICATION FOR INSURANCE IN  
THE PENN MUTUAL LIFE INSURANCE COMPANY  
OF PHILADELPHIA, PA.

1 A. Name in Full (please print)  
James McCulloch Jr.

B. Residence Address  
No. Street City County State  
4275 Ingleside Ave, San Diego, Calif.

C. If in County How Long Have  
.....Miles.... Direction You Resided at  
R.F.D. From Above City. Present Address?  
9 Years

D. Business Address  
No. Street City County State  
914 Beech San Diego, Calif

E. Send Premium Notices to  
914 Beech St. San Diego, Calif.

4 A. When and Where Were you  
Born?

Place County State  
Baltimore Md.

B. Day Month Year Age Nearest  
6 Dec. 1893 Birthday  
32

5. Are You (Indicate by X)  
Married X Single.... Widower....  
Widow....

6 A. What Other Insurance Have You  
on Your Life?

Company Amount  
Metropolitan 20 Pay Life 16,000.00  
Acasia " " 5,000.00

- F. If Married Woman, Give  
Maiden Name            Husband's Name
- G. Places of Residence Last Five Years  
San Diego, Calif.
- H. Do You Intend to Change Residence or  
Travel Outside the U. S.? (Give Details)  
No.
- I. Are You Engaged    Do You Intend so to  
in Military or Naval    Engage?  
Service?                    No
- J. Are You Engaged in    Do You Intend so to  
Aeronautics or Sub-    Engage?  
marine Service?            No
- 2 A. Occupation (State Kind of Business)  
Proprietor and Superintendent McCulloch  
Hospital
- B. Occupation During the Last Five Years  
As Above
- C. Any Change of Occupation Contemplated,  
Either Temporary or Permanent? (Give  
Details)                    No
- B. Have You Ever Applied to Any  
Company or Agent Without Re-  
ceiving a Policy of the Exact Kind  
and Amount Applied for?    No
- C. Are Any Applications Now Pend-  
ing (Give Details)            No
- 7 A. Sum to Be Insured    B. Plan  
\$10,000.00                    OLRE
- C. Premiums Payable  
   √ Annually  
   Semi-Annually  
   Quarterly
- D. If Disability Benefits Desired, In-  
dicate by X  
Disability Waiver  
of Premium ....  
Disability Waiver of  
Premium and Annuity X  
Double Indemnity X
8. How is Surplus to Be Used?  
(Rule out Those Not Desired)  
To Reduce Premiums  
To Increase Amount Insured



To Accumulate at 3% Interest  
✓ To Accelerate Maturity

9. What Settlement, If Any, Was Effected for Premium on Policy Hereby Applied For? Note

Remarks (Use This Space for Beneficiary Provisions, Preliminary Term Premiums, Etc.)

3 A. To Whom Shall Policy Be Made Payable?  
Anna R. McCulloch  
Outlives me, Otherwise to My Estate

B. Address San Diego, Cal. C. Relationship  
4275 Ingleside Ave. Wife

D. Beneficiary's Date of Birth E. Do you Reserve the Right to Change Beneficiary?  
June 1st, 1893 Yes

F. If Beneficiary Is Married Woman, State Maiden Name Husband's Name  
Rogan

For Home Office Endorsements Only

[On Margin]: NOTICE—THE FULL NAMES of all persons must be written and signed plainly and distinctly. Names must not be abbreviated. Every question must be fully answered. When a Creditor insures the life of a Debtor, both must sign.

My statements and answers to the questions printed above, and my statements and answers made and given to the Company's Medical Examiner, are full, complete and true. Upon them I base my application for insurance, and agree that they shall be regarded as a part of

the contract if and when issued. If the premium on the insurance herein applied for is not paid at the time of making this application, the contract of insurance shall not be in force unless or until a policy shall be issued and delivered to me and the first premium thereon actually paid during my lifetime and good health. If settlement is effected in accordance with the attached receipt at the time of making this application, the policy shall be in force as of the date of such settlement, provided the application is approved by the Company at the Home Office. The policy if and when issued and delivered to me, shall be in the form now in use by the Company. I understand that neither agents nor examiners have any authority to modify, alter or enlarge contracts. The foregoing agreements and declarations are made on behalf of myself and of any beneficiary under any policy on my life issued by the Company upon this application.

130473 to 130475

My acceptance of any policy issued on this application will constitute a ratification by me of any correction in or addition to this application made by the Company and noted in the space provided for "Home Office Endorsements Only."

In Witness Whereof, the applicant has hereunto subscribed his name. Dated at San Diego the 29 day of September 1925

Witness Present:

Don C. Carrell

Signature of the person  
proposed for insurance.....  
Sign the Names in full.

James McCulloch, Jr.

No. 434230

QUESTIONS TO BE ANSWERED BY THE PERSON TO BE INSURED

Name of Applicant James McCulloch Jr. Examined 11 A. M. This 30th Day of Sept. 1925.  
 (Write name in printed letters)

At San Diego, County of San Diego State of Calif. Residence 4275 Ingleside

Do you Contemplate Any Change of Residence or Occupation? No Date of Birth? Dec. 6, 1893 Name of Agent? D. C. Carrell Henking & Randolph

Age if Living	State of Health	Age at Death	Cause of Death	Duration of Fatal Illness
89	Good	57	(Gall Bladder)	

10. A.

Father  
 Mother

Full Brothers	{ How Many Living	2	17-29	Both
	{ " " Dead?	0		Good
Full Sisters	{ How Many Living	1	27	Good
	{ " " Dead	0		

Wife or Husband's Age If Living 31

State of Health Good

Age at Death —

Cause of Death —

Ages Attained:

Father's	Father's	Mother's
Father D.K.	Mother D.K.	Father D.K.
		Mother D.K.

(B) Has any near relative, uncles, aunts and grandparents included, had tuberculosis (consumption), cancer, apoplexy or Bright's disease. Explain fully. No.

If the family history shows a lack of longevity, give number and ages of uncles and aunts. See Note 6.

11 A. Are you now in good health? B. When were you last attended by a physician or consulted one? C. For what disease?

D. Give details in full.

E. Give name and residence of the physician who attended you.

F. Give name and residence of your medical adviser, or family physician, to whom you now refer for a certificate, if deemed necessary.

G. Has any physician ever given an unfavorable opinion of your insurability after either a formal or an informal examination?

H. Has any physician ever advised you to try a change of climate?

12. A. Have you ever been ruptured? B. Have you a hernia now? C. If so, do you now wear a suitable truss? D. Do you agree to wear one while insured in this company? Note 7.

A. Yes. B. 1920. C. Crushed lt. middle finger

D. Caught finger in bearing of auto.

E. Dr. Mott Arnold. Front & Spruce Sts., City

F. None

G. No

H. No

A. No

C. —

B. No

D. Yes—if necessary

13. A. Do you now use intoxicating liquors? A. No B. None  
 B. To what extent?  
 C. Have you ever used intoxicating liquors to excess? If so, explain the duration and extent of excess, and when last. C. No  
 D. Have you ever taken a cure for inebriety? Note 6. D. No
14. Have you ever used opium, morphia, chloral or any narcotic, unless regularly prescribed by a physician? If so, explain fully. No
15. A. Have you had insanity, apoplexy, palsy, vertigo, convulsions, sunstroke, congestion, inflammation, or any other disorder of the brain or nervous system? A. No  
 B. Have you had asthma, consumption, spitting of blood, habitual cough and expectoration, palpitation, or any disease of the throat, heart or lungs? B. No  
 C. Have you had appendicitis, indigestion, biliousness, cancer, or any tumor, pelagra, chronic diarrhoea, ear discharge, dropsy, fistula, gall-stones or gravel, C. No

renal or hepatic colic, open sores, inflammatory rheumatism, gout, syphilis or stricture, or any disease of the liver, kidneys, or bladder? Notes 8 and 9.

D. Have you any defect in hearing, in vision of either eye, any malformation or varicose veins? D. No

E. Are you now, or have you recently been associated with a person who has or has had consumption? E. No

16. Have you ever had illness, disease, injury or operation other than as stated by you above? If so, give full particulars, date, duration, severity, etc., of each. Use reverse side if necessary.  
Yes, fract. rt. forearm—both bones above wrist—complete recovery.

I Hereby Agree, That all the foregoing statements and answers, made to the Company's Medical Examiner, are a part of my application for insurance, are declared to be full, complete and true, and are offered to the Company as a consideration for the Contract.

Witnessed by  
 the Examiner

Signature of the person  
 proposed for insurance

James McCulloch, Jr.

H. S. Anderton, M. D.



[On Cover]: COPY

No.....

THE  
PENN MUTUAL LIFE  
INSURANCE COMPANY  
PHILADELPHIA

NAME OF INSURED  
JAMES MCCULLOCH, JR.

ORDINARY LIFE RATE  
ENDOWMENT POLICY

ANNUAL DIVIDENDS

TOTAL AND PERMANENT  
DISABILITY BENEFITS

PROVIDING FOR  
WAIVER OF PREMIUM

Amount, \$5,000.00

Date of Policy, November 27th, 1925

Yearly Payment, \$122.50

During the Continuance of this Policy  
Payable.....Annually

Due the 27th day of November

[Endorsed]: Filed Nov. 4, 1929 R. S. Zimmerman,  
Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

## MEMORANDUM

Being engaged in the trial of an extended jury case, attention to which precludes a detailed elucidation, within a reasonable time, of the reasons which we reach after a careful consideration of the facts and law of this case, and which direct, in our judgment, findings and decree for the defendant herein, this somewhat sketchy Memorandum is offered for the information of counsel, that progress in this cause may not be unduly delayed.

Under Northern Assurance Company vs. Grand View Building Association, 183 U. S. 204, as the doctrines of that decision are amplified and applied, under various sets of circumstances in subsequent Federal cases, we find that the several contracts were reasonable and unambiguous respecting those terms pertinent to the instant inquiry; and that plaintiff by his possession of the same, was charged with knowledge of the fact that he could not obtain the benefits of the total disability clause unless he paid the premiums or was excused, from so doing by condition of the policies.

We find also that, while it may not be that the exact nature of his illness in July, 1926, was made known to him, the circumstances thereof were so distinctly within his knowledge that he was chargeable with a duty to bring that condition to the attention of the Company to make it available at any time, as a reason why he should not promptly pay premiums or the obligations given against them.

The complaint is very much enlarged by charges against the defendant and its agents of duress, intimidation, and

imposition by them, and other harrassments of plaintiff when sick; expressed in many forms and which, it is alleged, affected his conduct prejudicial to his rights. We find the proof utterly lacking in these respects; that there is no justification whatever in the record for any of these charges; and that, on the contrary, it is evident that the Company, through its agents, was extraordinarily lenient in carrying the policies and in overlooking the defendant's failure to either pay, when due, the premiums or the obligations he had entered into to meet them; that such consideration by defendant and its agents rebuts, effectively, any reasonable inference that defendant sought to escape the burdens of the policy contracts.

We find specifically that there was no overreaching of the plaintiff in any way when, in December, 1926, and in March, 1927, he surrendered his policies and gave the several surrender notes in evidence; and that each of such surrenders effectively and permanently terminated any responsibility to plaintiff from defendant, growing out of the several contracts theretofore subsisting. Plaintiff was clearly in default for payment of the first year's premiums on the November, 1925, policies when, December 30, 1926, he executed Notes Policy Surrender of that date, and the same default situation as to the October policy when it was likewise surrendered, March 18, 1927, had already ripened. The plaintiff is apparently mistaken in his testimony that the surrenders were contemporaneous with the execution of the \$339.39 note to Carrell. The date of that transaction was April 19, 1927. Then Carrell, individually, had a claim against plaintiff through plaintiff's defaults which had involved Carrell into a debt to his principal for the charges for term insurance.

The testimony for the defense by Cornell leaves no foundation for a conclusion that the March 18 transaction was the result of duress.

Plaintiff was in default as soon as his post-dated February 24 check was dishonored. Thereafter plaintiff was powerless to enforce the policy and the only office of the Note Policy Surrender of March 18 was to evidence that situation. Even if duress in obtaining it were clear, still that would not affect the stability of the already accrued defaults.

We find our judgment of the plaintiff's bona fides herein somewhat affected by the implications in the record that he was attempting to carry an amount of insurance, \$51,000.00, represented by the three policies in question, and the contracts from other companies, which called for carrying charges evidently beyond his ability to meet, of which fact, it seems to us, he should have been cognizant; and that seems to the Court to be the only motivating reason why he surrendered those involved in this case. It may be that, until a year later, he was ignorant of the exact nature of his illness in July, 1926, and was still unadvised when he applied for disability privileges to the other insurance organizations. Still, it is obvious that when, as he says, he was fully enlightened in midsummer of 1927, he should have diligently pressed his alleged claims upon the already surrendered Penn Mutual policies. Assuming that he had a reasonable time after this alleged discovery to press his present claims, to wait nearly two years, as he did, to proceed under contracts which he had surrendered after default in paying the premiums or premium notes, was unreasonable. That delay is, in itself, a complete answer, in our judg-

ment, to his present claim that the surrenders were affected through the agents of the company taking advantage, in the early part of 1927, of his physical difficulties. Such delay, inexcusable from any standpoint in our judgment, so worked to the disadvantage of defendant because of the intervening disability of its principal witness, Carrell, as to make the present claim stale and to establish a complete defense of laches independent of the mere length of time.

Another feature of this case which has, we think an important office, is the character of his application in February, 1927, to reinstate his policies in the defendant company. Therein, over his signature, he said (Ex. Defendant's D) that he was then in good health and while in answer to a question whether he had had any sickness since November 24, 1925, he had answered truthfully, "Yes", yet the document carries, in the Certificate of Health from the medical examiner under the head of "Remarks", a statement that he had suffered from "Lobar Pneumonia—1926 2 Mo. disability—complete recovery—no complications", and it is reasonably inferable, considering the entire document, that this statement was substantially that which he made to the examiner, Dr. Anderton, in response to the direction to give full details of the intervening sickness which he had admitted. If his present statements can be accepted as to what was his physical condition in the early part of 1927, and if his averments in his complaint respecting this situation were made in good faith, the same characterisation cannot be attributed to the application for reinstatement.

We are further of the opinion that the testimony of the medical experts does not sustain the burden of proof

upon the plaintiff to show that his total disability eventuated in July, 1926, and continued until his illness in April, 1927. This testimony, in our judgment, sustains his representation to the defendant company in Exhibit Defendant's "D", that he had recovered from that illness with no complications which involved total disability. In fact, if he had suffered as he claims to have suffered continuously thereto and beyond the time when he surrendered the policies involved in this case, we think his representation to the Metropolitan Life Insurance Company and the Acacia Association, in his applications for total and permanent disability benefits, that the date of the beginning of the illness causing his then condition was about April 10, 1927 (Defendant's Ex. E and S; see, also G) was so inconsistent with his present claim as to throw doubt upon his bona fides in making them.

In general, it is the Court's opinion that under all of the circumstances of proof, illuminated by the extravagant character of the Complaint, it is asking too much of a Court of Equity to thrust upon the defendant the burdens of these total disability clauses upon the claims therefor so belated as to justify the conclusion that they were mere afterthoughts.

Plaintiff appeared to the Court as a person of considerable intelligence and one sufficiently acute to have reasonably considered (when he determined, in 1927, to demand relief from the other two companies for a disability which he averred had commenced about two months before) that his disability then was an acute manifestation of a condition which had subsisted since July, 1926,—if there was, in fact, any connection between the illnesses,—and to have been then so impressed with a belief in the responsibility



of defendant to him under the surrendered policies that expedition in pressing his present claims rather than to delay for two years more should have been distinctly in his mind. His business as manager of a hospital was such that he should have been able to more clearly understand his condition of health than one of equal intelligence in the same physical situation, but engaged in a pursuit less illuminating in its contacts.

Counsel may present findings of fact and law, and a decree for defendant consistent with the foregoing observations.

John M. Killits

[Endorsed]: Filed Apr 21 1931 R. S. Zimmerman,  
Clerk By Francis E Cross, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT and CONCLUSIONS OF LAW.

BE IT REMEMBERED that the above entitled and numbered action came on regularly for hearing on the 26th day of February, 1931, in the Courtroom of the Honorable John M. Killits, said Honorable John M. Killits, judge of said court, presiding therein: that at the time of said trial Messrs. Wright & McKee and Cyrus M. Monroe, Esquire appeared as solicitors for plaintiff, and Messrs. O'Melveny, Tuller & Myers and Messrs. Stearns, Luce & Forward, by J. R. Girling Esquire and Fred Kunzel Esquire of counsel, appeared as solicitors for defendant; that it appeared to the court from the files in said action that the defendant had been duly and regularly served with a copy of plaintiff's subpoena and bill, and

had filed its answer; that a trial of said action on the issues thus made and joined was duly had, and evidence both oral and documentary was adduced for and on behalf of plaintiff and defendant, and said court, having heard and considered the evidence and having taken the case under submission for determination and having examined and considered the briefs of the plaintiff as well as the brief of the defendant thereafter submitted to the court in lieu of argument, and being fully advised in the premises now makes its

#### FINDINGS OF FACT.

-I-

That all the allegations contained in Paragraph I of plaintiff's complaint are true.

-II-

That all the allegations contained in Paragraph II of plaintiff's complaint are true.

-III-

That the allegations contained in Paragraph III of plaintiff's complaint are true; except that said policy of insurance number 1191014, in order to become effective as respecting payment of permanent and total disability benefits to the insured, the plaintiff, required by its terms that the waiver of premiums and permanent disability payment features thereof were to start upon the date of the receipt by the company, the defendant, at his home office, during the lifetime of the insured, of due proof of total and permanent disability; and further, that said disability provisions and/or benefits should terminate upon any default in the payment of any premium; and further, that by the terms of said policy of insurance it was

agreed that the payment of premiums thereon would only be waived after the receipt of due proof of total and permanent disability of the insured, and during the continuance of such total and permanent disability of the insured.

-IV-

That the allegations contained in Paragraph IV of plaintiff's complaint are true; except that it is not true that before the second anniversary date of said premium, and, to-wit, on July 31, 1926, and before the sixtieth anniversary of the age of the insured, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit, pulmonary tuberculosis; that it is not true that plaintiff was compelled to remain confined to his home from July 31, 1926, until April 9, 1927; that it is not true that plaintiff was confined to his bed and compelled to remain therein from April 9, 1927, to the latter part of August, 1927; That it is not true that in consequence of said illness and disease plaintiff became or was permanently and totally disabled from engaging in any occupation whatsoever for remuneration or profit. That it is not true that said disease, independently from all other causes, and within the terms of said insurance, has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from July 31, 1926, continuing to the date of filing of plaintiff's bill.

-V-

The court finds, as to the allegation contained in Paragraph V of plaintiff's complaint, that it is true that on November 14, 1926, plaintiff made, executed and delivered to defendant his certain promissory note in the

sum of \$275.60, the same bearing interest at the rate of six per cent per annum, in payment of the premium due on said policy of insurance No. 1191914 on October 14, 1926, and that the due date of said promissory note was February 14, 1927; that it is not true that the giving and accepting of said note continued said policy No. 1191014 and the benefits thereunder, in force, to October 14, 1927; that it is true that said note was not paid when due; that it is true that said note was returned to plaintiff upon March 18, 1927, and said policy of insurance cancelled; that it is true that defendant's agency at San Diego, California, paid out term insurance on said policy of insurance No. 1191014 in the sum of \$42.98 for the period from October 14, 1926, to March 18, 1927. That it is true that at said time (November 14, 1926) plaintiff was further insured by defendant in the sum of \$20,000.00, represented by two certain policies of insurance numbers 1196773 and 1196774, issued to plaintiff by defendant; that it is not true that at or about the same time (November 14, 1926,) plaintiff, in payment of the premiums on said last two mentioned policies of insurance, made and delivered, at the request of defendant's said agent in the City of San Diego, California, a post-dated check in the sum of \$300.00; that it is true that when said policies of insurance numbers 1196773 and 1196774 were issued upon October 27, 1925, plaintiff gave a note for the first annual premiums thereon in the sum of \$551.20; that it is true that said note was due March 25, 1926; that it is true that said note was never paid; that it is true that said policies of insurance lapsed for non-payment of premium on each policy upon October 27, 1926, and were carried in force by defendant

until November 28, 1926, the expiration of the grace period of each; that said policies, and each of them were surrendered by plaintiff as respects the benefits of each policy, upon December 30, 1926, and plaintiff's said note returned to him. That it is true that in February, 1927, plaintiff gave to defendant's agent a post-dated check for \$300.00. That it is not true that shortly after the date mentioned in said check, as its due date, or at any time, the general agent of the defendant corporation in the City of San Diego, California, threatened plaintiff with criminal prosecution for the issuance and non-payment of said check and delivered said check over to the District Attorney of the County of San Diego, California, for criminal action and prosecution thereon.

That it is not true that plaintiff, because of his said illness and disease, being unable to follow or engage in any occupation for remuneration or profit, was unable to pay said note and said check when due, respectively.

That it is not true that defendant, by and through its general agent and representative in San Diego, California, wrongfully and fraudulently demanded the return and surrender of said policies of insurance #1196773 and #1196774 and/or policy number 1191014 and/or threatened plaintiff with further, or any, criminal prosecution should he fail or refuse to so surrender said policies of insurance to defendant.

That it is not true that plaintiff, being extremely ill and suffering with disease and/or believing that he would be criminally prosecuted should he fail or refuse to surrender said policies of insurance to defendant and/or laboring under duress and/or illness and/or without knowledge and information as to his rights under said



policies of insurance numbers 1196773, 1196774 and 1191014, surrendered and delivered said policy of insurance No. 1191014 to defendant's agent on or about March 8, 1927.

That it is true that upon March 18, 1927, plaintiff surrendered to defendant said policy No. 1191014 and executed a note policy surrender in respect to the same; that at said time plaintiff received from defendant all notes given as premium for said policy.

-VI-

That the allegations of Paragraph VI of plaintiff's complaint are true; except that plaintiff was advised of his true condition and the true and exact nature of his illness and disease prior to June 13, 1927. That it is not true that plaintiff was stricken with pulmonary tuberculosis on July 31, 1926, the date of his first confinement to his bed; that it is not true that because of fraud and duress practiced upon plaintiff and/or because plaintiff was not in possession of said policies of insurance and/or in ignorance of the disability features therein mentioned that plaintiff was unaware of the requirements of his policy of insurance No. 1191014 relative to notice and proofs in the event of permanent and total disability until on or about April 10, 1929. That it is true that plaintiff had been in possession of said policy No. 1191014 from October 14, 1925, until its surrender on or about March, 1927.

-VII-

The court finds as to the allegations contained in Paragraph VII of plaintiff's complaint that it is not true that the defendant corporation refused to permit plaintiff to file a claim for plaintiff's alleged disability; that it is



true that defendant refused to pay plaintiff any disability benefits arising under said policy of insurance No. 1191014, to-wit, the sum of \$100.00 per month from July 31, 1926 and thereafter; that it is true that no payments under said policy of insurance No. 1191014 were due to plaintiff in accordance with the terms and provisions of said policy of insurance; that it is true that on March 26, 1929, a letter from plaintiff, constituting plaintiff's first claim for disability benefits under the provisions of Policy No. 1191014, was received by defendant, and that at said time said policy of insurance was no longer in force by reason of its having lapsed for non-payment of premiums and a note policy surrender of the same having been executed by plaintiff cancelling and surrendering all of plaintiff's rights or benefits thereunder upon March 18, 1927.

-VIII-

The court finds as to the allegations contained in Paragraph VIII of plaintiff's complaint that plaintiff has not duly performed, or performed at all, all the conditions of said policy of insurance No. 1191014 on his part to be performed; that it is not true that there is due, owing and unpaid by defendant to plaintiff the sum of \$3700.00 together with interest thereon as of September 1, 1929, and/or thereafter at the rate of \$100.00 per month during the period of plaintiff's disability. That it is true that plaintiff did not during the period of time when said policy of insurance was in force and/or effect submit any proof of disability and/or claim for benefits under said policy to defendant. That it is true that said policy of insurance No. 1191014 lapsed by reason of non-payment by plaintiff of the premiums due thereon.

-IX-

That all of the allegations contained in Paragraph IX of plaintiff's complaint are true.

-X-

That none of the allegations contained in Paragraph X of plaintiff's complaint are true; except that on or about November 27, 1925, at the City of San Diego, County of San Diego, State of California, plaintiff made, executed and delivered to defendant his certain promissory note in the sum of \$551.20, bearing interest at the rate of 6% per annum, in payment by plaintiff to defendant of the first annual premium upon policy No. 1196773 and policy No. 1196774, in consideration of which defendant made and delivered to plaintiff its said policies of insurance numbered as aforesaid, agreeing to pay to the beneficiary named in policy No. 1196773 the sum of \$5,000.00, and to the beneficiary named in policy No. 1196774 the sum of \$15,000.00, upon the death of plaintiff.

-XI-

That the allegations contained in Paragraph XI of plaintiff's complaint are true; except that said policy of insurance No. 1196774, in order to become effective as respecting permanent and total disability of the insured, the plaintiff, required by its terms that the income or permanent disability features thereof were to start upon the date of the receipt by the company, the defendant, at its home office, during the lifetime of the insured, due proof of total and permanent disability; and further, that said disability provisions and/or benefits should terminate upon any default in the payment of any premium; and further, that by the terms of said policy of insurance it was

agreed that the payment of premiums thereon would only be waived after the receipt of due proof of total and permanent disability of the insured, and during the continuance of such total and permanent disability of the insured.

-XII-

That the allegations contained in Paragraph XII of plaintiff's complaint are true; except that it is not true that before the second policy anniversary of said life insurance policy No. 1196774, and on July 31, 1926, plaintiff was taken sick and became ill with pulmonary tuberculosis; that it is not true that plaintiff was confined to his home for a period which commenced nine weeks after July 31, 1926, or was confined to his bed and compelled to remain there during the period from April 9, 1927, to the latter part of August, 1927; that it is not true that in consequence of plaintiff's illness, commencing upon July 31, 1926, plaintiff became, was and is permanently and totally disabled from engaging in any occupation whatsoever for remuneration or profit. That it is not true that said disease, within the terms of said contract of insurance, has resulted in permanent disability wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from and since July 31, 1926, to the date of the filing of plaintiff's bill.

-XIII-

That none of the allegations contained in Paragraph XIII of plaintiff's complaint are true; but that it is true that said policy of insurance No. 1196774 lapsed for non-payment of premium upon October 27, 1926; that defendant continued said policy of insurance in force until November 28, 1926, which included the grace period upon

said policy of insurance. That it is true that said policy of insurance was surrendered by plaintiff upon December 30, 1926, to defendant, at which time the note given by plaintiff as the first year's premium thereon was returned to plaintiff.

-XIV-

That all of the allegations contained in Paragraph XIV of plaintiff's complaint are true; except that plaintiff was advised by his physician that he was suffering from tuberculosis prior to June 13, 1927; that it is not true that plaintiff had been suffering, or was stricken with pulmonary tuberculosis on July 31, 1926; that it is not true that plaintiff had been prior to on or about April 10, 1927, suffering with pulmonary tuberculosis, or that he had been prior to April 10, 1927, totally and permanently disabled from engaging in any occupation for remuneration or profit; that it is not true that because plaintiff was not in possession of said policy of insurance, or because of fraud and duress practiced upon plaintiff by the defendant's agent and representative, plaintiff was in ignorance and unaware of the requirements of said policy of insurance relative to notice and proof; that it is not true that plaintiff did not become aware that he was suffering from a disability until on or about April 10, 1929; that it is not true that the failure of plaintiff to have possession of the policy No. 1196774 was due to any fraud and/or duress practiced upon plaintiff by defendant or any of its agents; that it is not true that plaintiff was in complete ignorance of the disability features mentioned or contained in said policy of insurance; that it is not true that plaintiff was not aware of the requirements of said policy of insurance relative to notice and proofs to be furnished

to defendant in the event of total and permanent disability of plaintiff.

That it is not true that said policy of insurance, upon July 6, 1927, covered plaintiff, and would enable plaintiff to be entitled to the benefits mentioned and recited in said policy of insurance. That it is true that said policy of insurance was surrendered by plaintiff and a note policy surrender executed by plaintiff respecting the same upon December 30, 1926. That it is true that said policy of insurance, by its terms, lapsed for non-payment of premiums upon November 28, 1926. That it is true that plaintiff had in his possession policy of insurance No. 1196774 from and after October 27, 1925, the date when it was issued, until and including December 30, 1926, the date when said policy of insurance was by plaintiff surrendered and/or the benefits thereof released.

-XV-

The court finds as to the allegations contained in Paragraph XV of plaintiff's complaint, that none of the allegations therein contained are true, except that it is true that defendant failed and refused to pay plaintiff the disability benefits mentioned and recited in said policy of insurance, to-wit, the sum of \$150.00 per month from July 31, 1926, and/or thereafter. That it is true that plaintiff wrote a certain letter or claim received by defendant on March 26, 1929, and that on said date, March 26, 1929, said policy of insurance No. 1196774 was not in force and effect for the reason that said policy of insurance had lapsed for non-payment of premium and plaintiff, by the execution of a form of note policy surrender had, upon December 30, 1926, released and surrendered all his rights under said policy of insurance in considera-



tion of the return to him of his unpaid promissory note in the principal sum of \$551.20, given by him on or about November 27, 1925, to defendant for premiums upon said policy of insurance, together with policy of insurance No. 1196773.

-XVI-

That none of the allegations contained in Paragraph XVI of plaintiff's complaint are true; but that it is true that plaintiff never submitted to defendant any claim in respect to disability under the provisions of said policy of insurance No. 1196774 while said policy of insurance was in force and/or effect. That it is true that plaintiff never paid to defendant any premium upon said policy of insurance No. 1196774.

-VII-

That all the allegations contained in Paragraph XVII of plaintiff's complaint are true.

-XVIII-

That all the allegations contained in Paragraph XVIII of plaintiff's complaint are true; except that said promissory note in the sum of \$551.20 was tendered to defendant by plaintiff for the payment of premiums upon policies of insurance numbers 1196773 and 1196774.

-XIX-

That the allegations contained in Paragraph XIX of plaintiff's complaint are true; except that by the terms of said policy of insurance No. 1196773 the agreement to waive payment of premiums in respect to said policy of insurance was only effective from and after receipt of due proof by defendant of permanent, total disability of plaintiff, the insured, during the life of said policy of insurance, without default in payment of premiums.



## -XX-

That the allegations contained in Paragraph XX of plaintiff's complaint are true; except that it is not true that before the second anniversary of said policy, and on or about July 31, 1926, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit, pulmonary tuberculosis; that it is not true that plaintiff was confined to his bed and compelled to remain therein from April 9, 1927, to the latter part of August, 1927; that it is not true that said disease, independently from all other causes, and within the terms of said contract of insurance, has resulted in permanent disability from July 31, 1926, to the date of the filing of plaintiff's bill herein.

## -XXI-

That none of the allegations contained in Paragraph XXI of plaintiff's complaint are true.

## -XXII-

That the allegations contained in Paragraph XXII of plaintiff's complaint are true; except that plaintiff was not advised by his physician that he had tuberculosis on or about July 6, 1927, but was so advised prior to April 10, 1927; that it is not true that plaintiff was advised that he was stricken with pulmonary tuberculosis on July 31, 1926; that it is not true that plaintiff was stricken with tuberculosis on July 31, 1926; that it is not true that because of any fraud or duress practiced upon plaintiff by defendant's agent and/or representative plaintiff was unaware of the disability provisions in said policy of insurance and/or the requirements of said policy of insurance relative to notice and proof to be furnished defendant; that it is not true that plaintiff first knew the requirements of said policy of insurance relative to notice

and proof in the event of total and permanent disability and/or was unaware of the disease and illness with which he was suffering until on or about April 10, 1929; that it is not true that the failure of plaintiff at any time to have possession of policy No. 1196773 was due to any fraud and/or duress practiced upon plaintiff by defendant or any of its agents. That it is true that plaintiff had been in possession of said policy of insurance No. 1196773 from the date of its issuance upon October 27, 1925, until the date of its surrender upon December 30, 1926.

-XXIII-

That the allegations contained in Paragraph XXIII of plaintiff's complaint are true; except that it is not true that said policy of insurance No. 1196773 was in full force and effect at the time plaintiff requested claim blanks from defendant for the purpose of filing his claim for total and permanent disability benefits on or about March 26, 1929. That it is true that policy No. 1196773 had lapsed for non-payment of premiums on November 28, 1926, and upon December 30, 1926, plaintiff had executed a note policy surrender, surrendering each and all of the benefits under said policy in consideration of the return to him of his unpaid note for \$551.20 and the release of his liability under said note. That it is true that plaintiff had never paid any cash as premiums on either the first or second year premiums on said policy of insurance No. 1196773 and/or policy No. 1196774. That it is not true that defendant refused to permit plaintiff to file a claim for disability benefits in respect to said life insurance policy No. 1196773.

-XXIV-

That none of the allegations contained in Paragraph XXIV of plaintiff's complaint are true. That it is true that plaintiff did not submit any claim to defendant as respects the disability of plaintiff under the provisions of policy No. 1196773 while said policy was in force and/or effect. That it is true that plaintiff did not pay to defendant any cash whatsoever as premium for said policy of insurance No. 1196773.

-XXV-

That it is true that defendant, through its agent, was extraordinarily lenient in carrying the three policies of insurance numbers 1196773, 1196774 and 1191014 after plaintiff had failed to pay when due either the premiums or the obligations he had entered into to meet the premiums on said respective policies. That there was no sharp practice, fraud or deceit engaged in by defendant in any way in December 1926, and in March 1927, when plaintiff surrendered to defendant his three said policies of life insurance Numbers 1196773, 1196774 and 1191014, and gave and executed the several note policy surrenders respecting the said policies of insurance. That each of said surrenders definitely and permanently terminated any responsibility of defendant to plaintiff growing out of the several policies of life insurance. That that certain promissory note in the sum of \$339.39 executed by plaintiff under date of April 19, 1927, and given to defendant's agent, was executed as an individual monetary transaction between plaintiff and said agent, and in payment for moneys paid by said agent for the use of plaintiff.

## -XXVI-

That plaintiff was duly advised in midsummer of 1927 as to his true physical condition; that plaintiff failed and neglected to present any claim to defendant until March, 1929, and said delay on the part of plaintiff to proceed under the three insurance policies which he had surrendered to defendant's agent after default in the payment of premiums or premium notes was an unreasonable delay; that such delay in presentation of proofs or claims by plaintiff worked to the disadvantage of defendant because of the intervening disability of defendant's agent and principal witness, Carrell; and was such as to make plaintiff's respective claims as to his three demands for disability stale, and to establish the defense of laches interposed by defendant as to each of the three causes of action in plaintiff's complaint, independent of the mere length of time.

## -XXVII-

That plaintiff attempted to reinstate said policies of insurance Numbers 1196773, 1196774 and 1191014 in the month of February, 1927, and at said time, in his written application for reinstatement, stated that he had completely recovered from his illness of 1926, to-wit, lobar pneumonia with two months disability. That plaintiff was, prior to 1926, and thereafter, carrying insurance in two other Insurance companies, to-wit, two with or in the Metropolitan Life Insurance Company and one with or in the Acacia Mutual Life Association; that plaintiff applied for the benefits of permanent total disability provisions in respect to each of the policies in the two last named insurance companies; that plaintiff in his application for benefits to Metropolitan Life Insurance Company under

date of August 10, 1927, stated that the date of the commencement of his illness which caused disability was April 20, 1927; that plaintiff stated in his application for disability benefits to Acacia Mutual Life Association under date of March 28, 1928, that he became totally disabled on April 10, 1927. That on said respective dates, August 10, 1927, and March 28, 1928, when plaintiff so made his aforesaid applications for disability benefits to Metropolitan Life Insurance Company and to Acacia Mutual Life Association, plaintiff had surrendered all benefits in and to policies of insurance Numbers 1196773, 1196774 and 1191014.

And from the foregoing Findings of Fact the court now makes its

### CONCLUSIONS OF LAW.

-I-

That the complaint of plaintiff should be dismissed with prejudice.

-II-

That plaintiff's causes of action, if any, sued upon in plaintiff's bill, and each and all of them, is barred by the laches of plaintiff.

-III-

That plaintiff, by receiving his policies of life insurance, and each of them, and retaining them until surrendered, knew of the disability benefit provisions contained in them, and each of them, and the requirements as to the submission of proof of permanent and total disability to the defendant in order to obtain benefits under each or any of said policies of insurance.

-IV-

That all rights of the plaintiff in and to each and all of said policies of insurance numbered respectively 1196773, 1196774 and 1191014 were terminated upon the surrender of each of said policies, and said policies were not in force upon the 28th day of March, 1929, when plaintiff first offered proof of any disability in respect to any of said policies.

-V-

That a decree should be entered accordingly.

DONE IN OPEN COURT THIS 14th DAY OF  
May, 1931.

John M. Killits

Judge of the above entitled court.

Approved as to form as provided in Rule 44.

Wright & McKee

C. M. Monroe

Solicitors for plaintiff.

[Endorsed]: Filed May 19, 1931. R. S. Zimmerman,  
Clerk, by Thomas Madden, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

DECREE

Pursuant to written Findings of Fact and Conclusions of Law herein made and filed, and on motion of J. R. Girling, Esquire, one of the solicitors for defendant,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff take nothing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's complaint herein be dismissed



with prejudice, and that defendant have and recover its costs of suit expended in this action. Costs taxed at \$174.65.

DONE IN OPEN COURT this 14th day of May, 1931.

John M. Killits  
Judge of the above entitled court.

Approved as to form as provided by Rule 44.

Wright & McKee

C. M. Monroe

Solicitors for plaintiff.

Decree entered and recorded MAY 19, 1931.

R. S. ZIMMERMAN, Clerk.

By Thomas Madden,

Deputy Clerk.

[Endorsed]: Filed May 19, 1931. R. S. Zimmerman, Clerk, by Thomas Madden, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

ORDER TO SHOW CAUSE

TO PENN MUTUAL LIFE INSURANCE COMPANY OF PENNSYLVANIA, a corporation, defendant, and to MESSRS. O'MELVENY, TULLER & MYERS and MESSRS. STEARNS, LUCE & FORWARD, attorneys for said defendant:

Upon the petition of JAMES McCULLOCH, JR., plaintiff in the above-entitled cause, copy of which petition is attached hereto, and on the motion of plaintiff:

IT IS ORDERED, ADJUDGED AND DECREED that the defendant show cause before the undersigned Judge of the District Court of the Southern District of

California, Southern Division, at his chambers in the Federal Building in the city of Los Angeles, County of Los Angeles, State of California, why a rehearing should not be granted in the above cause.

Service of this order and the papers on which it is granted shall be made upon defendant's attorneys on or before two (2) days from the date hereof.

IT IS FURTHER ORDERED that said petition may be submitted and considered upon written argument, that on behalf of the plaintiff to be filed within 10 days from the date hereof, and defendant's argument in reply to be filed within 8 days thereafter; copies of said written memoranda are to be served upon opposing counsel.

Dated: May 19, 1931

John M. Killits  
District Judge

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

JAMES McCULLOCH, Jr.,	} Plaintiff,	No A-5-M In Equity PETITION OF PLAINTIFF FOR REHEAR- ING
-vs-		
PENN MUTUAL LIFE INSURANCE COMPANY OF PENNSYLVANIA, a corporation,	} Defendant	

TO THE HON. JOHN M. KILLITS, Judge of the District Court of the Southern District of California, Southern Division:

The petition of JAMES McCULLOCH, JR., plaintiff in the above entitled cause shows:

1. That on the 13th day of September, 1929, plaintiff herein filed his bill of complaint in this Court alleging that the defendant had issued three (3) certain policies of insurance upon his life; that said policies contained provisions for the waiver of premiums in case of disability and for the payment to plaintiff of disability benefits in case of such total permanent disability; that such disability had accrued during the time when said policies were in force; that the policies had been canceled and surrendered thru mutual mistake and fraud of the defendant company, and praying in substance that the policies be declared to be in full force and effect and that defendant be required to pay disability benefits accruing since July 1926.

2. That on the 4th day of November, 1929, the defendant filed its answer wherein in substance it denied the existence of said total permanent disability during the time the policies were in force; denied that conditions precedent to the obtaining of such benefits had been complied with by plaintiff and alleged that said policies had expired for non-payment of premiums and were no longer in force.

3. That on the.....day of May, 1931, the Court rendered a decision and made its written findings of fact and conclusions of law and on the .....day of May, 1931, a decree was entered in said Court in favor of defendant directing that the defendant recover its costs.

4. That the plaintiff believes the decree entered in this cause to be erroneous and he has been aggrieved by said decree in that the same is contrary to the undisputed evidence and said decision, findings and decree were rendered and entered upon a misapprehension of the facts involved in said cause, and particularly in that the Court decided and found that there was no sufficient evidence to establish that the plaintiff became permanently and totally disabled during the time when said policies of insurance were in force, while in truth and in fact it was

established by the positive and uncontradicted evidence of three (3) expert physicians that in July, 1926, and at a time when it was undisputed that said policies were in force, plaintiff became afflicted with pulmonary tuberculosis to the extent that he was totally disabled and incapacitated from carrying on any remunerative occupation and that he had at all times since said date remained totally incapacitated. That said evidence was and is undisputed and was corroborated by both the testimony of the plaintiff and his wife. That the only possible conflict in said evidence arises out of statements made in subsequent applications to insurance companies at a time when plaintiff did not know the cause of his illness and disability, his lack of knowledge of said disability having been established by the positive and uncontradicted testimony of his physician and his wife. That under the law as cited to the Court upon argument, it being established that such disability occurred in the year 1926, all other defenses presented on behalf of defendant are ineffectual and plaintiff is entitled to judgment and decree as prayed for.

WHEREFORE, the petitioner prays that this Court will grant a rehearing of said cause on such terms as to this Court shall seem just.

Dated: May 18, 1931.

A. L. Wissburg

and

WRIGHT & McKEE

By C. M. MONROE

Attorneys for plaintiff

[Endorsed]: Received copy May 19 1931 O'Melveny, Tuller & Myers By (Invalid unless countersigned) R. B. Beat Filed May 19 1931 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

MEMORANDUM OPINION

Killits, J.:

Late in August during our absence from the country the motion for rehearing in this case was forwarded to our office, and the first opportunity to consider the same is now employed. The motion raises no question not thoroughly considered at the time we filed our memorandum supporting the decree April 21, 1931. There is no essential question of fact which was without dispute in the evidence, i. e., as to such a point there was evidence on both sides, and the question raised in the motion is whether the Court should reconsider its judgment on these questions in dispute reached as a result of hearing the testimony and seeing and considering the witnesses. This is especially true with the vital question, whether the complainant had active tuberculosis continuing from his illness in July, 1926, through the following winter, and until after he surrendered the policies. Upon this subject the evidence was in conflict. Aside from that the Court was justified in considering whether or not the defendant, noting him, his environment and vocation, and his physical experiences, should not have known the seriousness of his condition during that period if he had

active tuberculosis, or at least have been put on inquiry in that respect.

In their argument against the motion, counsel for the defendant apologized for the suggestion there made that it is known to medical science that tuberculosis once developed may be finally arrested. That apology was unnecessary. The law of judicial knowledge has been expanded to cover the ascertainments of science, invention and discovery in most of the important lines of human experience. We think we are justified in taking judicial knowledge of the fact well known to the medical world as established that the existence of tubercular scars in the lungs of persons once suffering from that disease, and who are completely cured, is a common occurrence. These considerations are of considerable pertinence when regarded along with plaintiff's representations in the Spring of 1927, especially in his application for reinstatement of the policies in question when it was stated that he was in good health.

An inference may exist, proof of active tuberculosis in 1926, and proof of that condition at an examination some time later being made, that such a condition was continuous, but here there is proof which, accepted, tends strongly to destroy the theory of such continuity. In this case, as we weigh the evidence, the preponderance of the proof is to the effect that the 1926 outbreak was overcome, and that the later development had its origin in the Spring of 1927. It may be that the experience McCulloch



endured in 1926 left him more susceptible to another attack of the disease as a sequel to a new pulmonary illness, but that susceptibility, if it existed, is not a permanent disability, within the meaning of the provisions of the insurance contracts. The defendant is not a charitable organization—it is a trustee for its active beneficiaries, whose interests must be preserved against demands which are not founded upon its contracts with reasonable clarity. This is not a case where sympathy should cloud judgment in the slightest.

The motion is denied, as shown by the accompanying order.

John M. Killits

United States District Judge.

[Endorsed]: Filed Oct 12 1931 R. S. Zimmerman,  
Clerk By B. B. Hansen Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

ORDER

This cause coming on to be heard on the motion of the plaintiff for a rehearing, the same was heard and considered, the Court finding the said motion without merit. WHEREFORE the same is denied.

John M. Killits

United States District Judge.

[Endorsed]: Filed Oct 12 1931 R. S. Zimmerman,  
Clerk By B. B. Hansen Deputy Clerk

(Testimony of James McCulloch, Jr.)

[TITLE OF COURT AND CAUSE.]

### AGREED STATEMENT OF EVIDENCE

BE IT REMEMBERED that the above entitled cause came on regularly for trial before the above Court, sitting in equity, on the 26th day of February, 1931, upon the issues formed by the complaint and answer thereto, Messrs. A. L. Wissburg, Wright & McKee and C. M. Monroe appearing as counsel for plaintiff, and Messrs. O'Melveny, Tuller & Myers, J. R. Girling, and Stearns, Luce & Forward and Fred Kunzel appearing for defendant.

### PLAINTIFF'S CASE

JAMES McCULLOCH, JR.,

plaintiff, called as a witness in his own behalf, testified as follows:

My name is James McCulloch, Jr. I am 37 years of age. In 1925 I was living at No. 4275 Ingleside Drive, San Diego, California. I was operating McCulloch Hospital at that time. Prior to taking out insurance in 1925, I had a conversation with Mr. Randolph and with Mr. Don C. Carrell. They were engaged in the insurance business in San Diego. I took out a policy in October 1925. (Policy identified in evidence and marked Exhibit 1).

(It is stipulated that all policies in regard to this transaction are correctly copied and attached to the exhibits in the Answer of the defendant, and referred to as Exhibits A, B and C.) Policy A is for \$10,000. At the time this policy was taken out I executed a note. The

(Testimony of James McCulloch, Jr.)

note was identified by the witness and offered in evidence as Plaintiff's Exhibit 1, which is in words and figures as follows:

“\$275.60

September 29, 1925.

“Four months after date I promise to pay to the order of THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, at 504 Union Building, San Diego, Calif., Two Hundred Seventy Five and 60/100 Dollars, without defalcation, value received (account of policy No. 1191014) with interest from.....

Due January 29th, 1926. Signed James McCulloch, Jr., 4275 Ingleside Avenue, City.”

504 Union Building is the office of the Penn Mutual Life Insurance Company, Mr. Randolph's office. Mr. Randolph is the agent. I gave the note to Mr. Carrell. I received a receipt when the note was paid.

(Receipt was received in evidence and marked Plaintiff's Exhibit No. 2).

I made a payment on the note 12/12—\$150.00, and I subsequently paid the balance of the note. I received a statement showing the balance due on the note prior to making payment of the balance. I identify this (paper) as the statement. (Statement as identified received in evidence, dated April 10th, 1926, showing the balance of the amount of the note, \$125.60, and marked Plaintiff's Exhibit 3.) Payment of the balance of the note was made by check (Check was received in evidence and marked Plaintiff's Exhibit 4.) (Check on the First National Bank of San Diego, dated September 10, 1926, to

(Testimony of James McCulloch, Jr.)

the Penn Mutual Life Insurance Company, for \$125.60, cancellation as paid<sup>1</sup> as of September 25th, 1926.)

I subsequently took out two other policies, for \$15,000 and \$5,000. The two were taken out at the same time. (Policies attached to the Answer the \$15,000 policy marked Exhibit B and the \$5,000 policy marked Exhibit C.) I gave a note at the time of the taking out of those policies. (Note received in evidence, marked Plaintiff's Exhibit 5). (Note dated November 25th, 1925, for \$551.20, due March 26th, 1926.) The note was not paid at the time it was due.

I was taken sick July 31st, 1926. I called in Dr. Tanner and I was in bed two or three days and I got up and went to the hospital, about four o'clock that afternoon I was taken down with a violent chill and fever, and was brought back home again. I called the doctor after that and was in bed for a considerable time. I was in bed continuously, I think, to about the middle of September. Dr. Tanner and Dr. Alberty waited on me. They are both doctors of San Diego. At that time I did not know the nature of my illness. I was told the nature of my illness was pneumonia. After July, when I was taken sick, I attempted to take care of my business but I could not. I was unable to do it, and Mr. Whalen was taking care of the business at that time. The business just went from bad to worse, and it failed. I have not done any business since July 1926. I attempted to see what I could do for a couple of days, but I had to go home and go to bed again. I was very weak and was unable to stand it very long. Just a few hours at a time. I had to go home and lie down and was running a temperature every

(Testimony of James McCulloch, Jr.)

day. I was able to stay at the business about an hour. That condition continued ever since that time. The premium notes on those two policies, \$15,000 and \$5,000 were not paid when it was due, for I was unable to. I did not have the money. I gave a note for the second premium on the \$10,000 policy, the first policy, the "A" policy. I think I gave the note to Mrs. Kelly. It was sent down to the office. I think the note was made out by her when I signed it. The note handed me is the note I gave for the second year's premium on Policy A, the \$10,000 policy, which was received in evidence and marked Plaintiff's Exhibit 6. The note states "November 14, 1926", for \$275.60, payable at the San Diego Agency, and payable to the Penn Mutual Life Insurance Company of Philadelphia. Later on I gave other notes on the other two policies. I paid Mr. Carrell another note covering the other two policies. At the time I gave him that check, I gave him a note for the second year's premium of the other two policies. I never got the note back. It was on the same form as the note you have shown me. With reference to the first year's premium on the other two policies, the \$15,000 and the \$5,000, I gave Mr. Carrell a check for \$300.00. The check was post dated, I think, for fourteen days, and when they put the check in the bank there were no funds to cover it and it was sent back. The check was given in February 1927. I made an appointment and met him at the hospital and gave him the check. I had numerous conversations with Mr. Carrell about the premiums on this insurance policy before giving him the check. Four or five times on the telephone. The check that you hand me is the check



(Testimony of James McCulloch, Jr.)

that I gave to Mr. Carrell. It was a post dated check, given about fourteen days before the date that it bears. (Check introduced which was received in evidence and marked Plaintiff's Exhibit 7.) It is a check on the First National Bank of San Diego for \$300. payable to the order of C. L. Randolph and Son. At the time I gave the check he told me if I would give him that much at that time they would arrange to carry the difference in the office and take a renewal note of the premium for the next year. It was to be applied on the first year's premium. On the \$5,000 and the \$15,000 policies. At the time I gave the check I was unable to work. I was weak and sick. I was again confined to bed in 1927, the first part of April. After I gave Mr. Carrell the check I had a subsequent conversation with him at the house about it. That was some time in March. It was after the check had become due. It was not paid at that time. I failed to meet the payment on the check and it was placed in the hands of Mr. Peterson, an attorney, who wrote me and I called to see him and he demanded payment. I could not give it to him. About a week after that I received a letter from the District Attorney's office. I was interviewed at the District Attorney's office. I was summoned there on account of that check. I saw Mr. Cornell at the District Attorney's office, Mr. Jack Cornell. He had the check at the time he talked with me. I had further conversation with Mr. Carrell at my home about the check. I believe this was sometime in March or April. Mr. Carrell told me he had taken the check up to the District Attorney's office. He said he would prosecute me on it, and various things. I gave him the



(Testimony of James McCulloch, Jr.)

note at the time to cover the check, and he had some figures there on a piece of paper, short rate term, or something, on the policy. I gave him a note to cover what he had been forced to pay by the Company. That is what he told me. This is the note given at the time. (paper handed witness) (Note received in evidence, marked Plaintiff's Exhibit 8). The note is for \$339.39, dated April 19, 1927, for 60 days, payable to Don C. Carrell. Signed James McCulloch Jr., and bears the endorsement "Paid in full, March 28, 1930, D. C. Carrell". Mr. *Carrel* put that endorsement on it. When I gave the note Mr. Carrell demanded the surrender of the policy. The policies were given up by me, all three of them.

After that time, I was sick in bed for quite a while, and wasn't getting much better in July I decided to go to the hospital and applied to the Veteran's Hospital for hospitalization. At that time I was informed what was the matter with me. I was informed that I was suffering from tuberculosis. Prior to that time I had not been informed that I was suffering with tuberculosis. I did not know it prior to that time. At the time I gave the notes for the second year's premium on these policies, I did not know the nature of my illness. During the early part of 1927 I understood the nature of my illness to be pneumonia and pleurisy with effusions, fluid in my side. When I was taken down in 1927, I also consulted Dr. Kramer (Ramer). On July 6th, I applied to the Veterans for hospitalization. Dr. Pasche examined and X-rays me at the Navy Hospital. At or about that time he made a report of me to the Metropolitan Life Insur-

(Testimony of James McCulloch, Jr.)

ance Company. It was not in connection with that report that I learned the nature of my illness. He told me outright what my illness was.

The note was due and Mr. Carrell would write me letters and come to see me and trying to collect it, and I received a letter from him demanding payment or he would start suit. I am referred to the last note given to Mr. Carrell given to pay the \$300.00 check. I received this letter and called him up and made an appointment. This was the 3rd, or 4th of March 1929. I talked with him and asked him why I should get stuck with this because I had never received any benefits from it. He said "You had been covered, if you had filed your claim you would have received your disability benefits". At that time he gave me the \$10,000 policy back with two or three of the notes. That is the time I received back the original \$10,000 policy from Mr. Carrell. Up to the time of that conversation, in March 1929, I did not realize that I had any possible claim against the Company for disability for the reason that the policies were not in my possession. I thought it was gone. I had no copies prior to that time. A little later the Company furnished me with copies of the policies at my request. I went to see Mr. Carrell in 1929 in connection with the note and he read over the disability provisions of the policy. I told him then that I felt the policies were in force and I wanted to file a claim. Mr. Randolph was called in and he took the matter up with the Company and they refused to allow me to file a claim. The paper handed me, dated March 14, 1929, I got from Mr. Randolph. He said it was a copy of a communication he had from the home

(Testimony of James McCulloch, Jr.)

office of the Company. (Instrument offered and received in evidence, Letterhead of Penn Mutual Life Insurance Company, dated March 14, 1929, Subject: Disability Claim, James McCulloch, Jr., Policy No. 1191014, S. L. Randolph and Son) and in words and figures as follows:

“Your communication of the 8th, inst. at hand with regard to the above named person’s disability. We note that the policy mentioned in your letter was, as you state, forfeited as of October 14, 1926 by reason of non-payment of the premium due on that date. I regret to advise, however, that having failed to file claim for disability benefits while the policy was in force, the insured waived his right to apply for the benefits to which he might have been entitled.

The disability clause plainly provides that total and permanent disability benefits automatically cease upon the default in the payment of any premium. I regret, therefore, that we consequently cannot see our way clear to allow Mr. McCulloch to file claim for disability benefits at this time.

Very truly yours,

Malcolm Adam, Supervisor.”

I received a letter from the Company direct in answer to a letter I wrote them. I kept a copy of my letter. This is the copy (witness identifies paper). The other letter you hand me is the answer I received from the Company. (Copy of letter dated March 23, 1929 written by Mr. McCulloch to the Company offered and received in evidence, marked Plaintiff’s Exhibit 10.) (Letter dated April 5, 1929 from the Company to Mr. McCulloch of-

(Testimony of James McCulloch, Jr.)

ferred and received in evidence, marked Plaintiff's Exhibit 11).

(Exhibit No. 10, offered and received in evidence, dated March 23, 1929, from Mr. McCulloch to the Company, is in words and figures as follows:

“To the Penn Mutual Life Insurance Company,  
Philadelphia,

Attention Mr. Malcolm Adam.

Gentlemen:

In reference to your letter of March 14th, to Mr. Randolph, your general agent in this City, in connection with my claim for disability benefits under my policies which was rejected by you.

I wish to state that by reason of the fact that my total disability commenced on July 31st, 1926 and at which time my policies were in full force that I feel and still contend that I am entitled to the reinstatement of my policies and the benefits provided therein.

Owing to my disability since July 31st, 1926, I have been incapacitated from doing any work or to take care of my business, consequently I was unable to meet the premiums on my policies when due. In connection with my delay in filing this claim, I wish to state that owing to the fact that soon after I took sick these policies were demanded of me by your local agent and I did not have same in my possession from that time on. At the time these policies were surrendered to your agent I was sick in bed and your local office was aware of this fact.

So according to this statement I think you should reconsider my application and allow me to present my

(Testimony of James McCulloch, Jr.)

claim. I will also appreciate it very much if you would forward to me photostatic copies of policies #1196773 and #1196774 which were issued to me.

Respectfully yours,

James McCulloch, Jr."

These numbers refer to the \$15,000 and the \$5,000 policies.

Plaintiff's Exhibit 11, on the letterhead of the Penn Mutual Life Insurance Company, offered and received in evidence, was in words and figures as follows:

"April 5, 1929.

Mr. James McCulloch,  
4411 Central Avenue,  
San Diego, California.

Dear Mr. McCulloch:

"Your letter to the Supervisor has been sent to me and I have carefully gone over the facts which you write concerning your policies in this Company.

You will recall that you had three policies in the Penn Mutual. Policies Nos. 1196773 and 1196774 were issued on November 27, 1925, both policies containing provisions for waiver of premium in case of total and permanent disability, and policy #1191014 contained a provision for the payment of certain annuities in the event of total and permanent disability. When the first two policies were issued, you gave us your notes for the first year's premium on both policies. However, you never met these notes, which fell due on March 25, 1926, but the Company carried the policies until a year had elapsed, that is, until November 27, 1926, the policy anniversary. You were



(Testimony of James McCulloch, Jr.)

then unable to meet the premiums and the policies were surrendered by you on the 30th of December, 1926.

You state your disability commenced July 31st, 1926. Your notes has fallen due on March 26, 1926, and you had made no effort to pay them off between that time and the date of your disability. Moreover, you did not surrender the policies until December 30th, 1926. Therefore, you had had four months in which to make claim for the disability and waiver of premium benefits. We realize that a denial of a liability by this Company may seem to work a great hardship upon you, but I feel that it would be entirely unfair to our other policyholders if we did not in this case hold to the terms of the policies which require that due proof of disability be submitted before the policies are surrendered and before there has been a default in payment of any premium in order for the disability and waiver of premium benefits to become effective. For this reason I regret that we cannot allow you to present your claim for disability at this time.

Policy No. 1191014 was issued October 14th, 1925, the premium being paid in cash to October 14th, 1926. You gave a note for the 1926-1927 premium which note became due February 14th, 1927. You failed to meet this note when it became due and surrendered the policy on March 8, 1927. In the case of this policy had you applied for disability and waiver of premium benefits before October 14th, 1926, you would beyond any doubt have been entitled thereto, provided, of course, that the proofs submitted by you were satisfactory, but here again the terms of the contract provide that the due proof of disability must be furnished before there has been a default



(Testimony of James McCulloch, Jr.)

in the payment of any premium or before the policy has been surrendered and I am afraid that we have no choice other than to hold you to the terms of the contract.

I am enclosing copies of the policies made up from our records so that you may see for yourself the terms of the contracts to which I have referred. I hope you will appreciate that, in cases such as this, a mutual life insurance company has no choice whatever as to whether or not, in certain deserving cases, exception shall be made and the terms of the policy contracts overlooked. Your case is but one of many in which consideration for other members demands that we adhere strictly to the provisions of the policies though the equities may seem to point to a more lenient course of action.

Regretting that I cannot make a more favorable report to you concerning the status of your policies, I am,

Yours very truly,

Robert Deckert,  
Vice President and Counsel."

After the receipt of that letter I took the case up with my attorney. I brought suit. (Record shows that note was paid after suit brought). On the various transactions of the issuances of the policies and the giving of the notes, I dealt with Mr. Carrell. He originally wrote or solicited the policies. I did not have copies of the policies from the time I discovered, or was informed, that I was suffering from tuberculosis. Not until Mr. Carrell gave me the copies in March 1929. At the time I was taken sick I was X-rayed by Dr. Kinney, in August, 1926. After I found out what my trouble was I made

(Testimony of James McCulloch, Jr.)

investigation to learn whether at that time my case was diagnosed as tuberculosis. I went and found out what the first report of the picture was. That was the first I knew that was the nature of my trouble. I knew at the time of this conversation in 1929 when I had the policy in my possession that they were in force at the time and I could have filed a claim. At the time I surrendered the policies I believed there was due and owing the second year's premium.

I was taken down in July 1926 and was confined to my bed to about the middle of September. I was unable to leave the place until some time about the first part of November. After that I could get out and around a little bit and was again taken down in April. I was in bed at that time about three months. I had numerous setbacks since then, I cannot remember the dates, also last fall. I have had to take rest periods every day, and was again confined to my bed this fall, for five days. I am not able at this time to do any work.

CROSS EXAMINATION OF WITNESS  
BY MR. GIRLING.

I was operating the hospital, taking care of the place. I am not a physician or surgeon; I was manager of the hospital. I had employees at the hospital, bookkeeper, nurses and the usual employees found at a hospital. I took over the hospital in 1922, in the early part of the year. My duties were management of the hospital and assisting in carrying the patients. I would usually start the day's work about eight or nine o'clock, sometimes leave at noon and then back again in the afternoon and stay until around seven or eight, or nine o'clock in the

(Testimony of James McCulloch, Jr.)

evening, sometimes stay half the night. I devoted practically all of my time to the hospital. Did not do outside work. I worked at Rockwell Field for the United States Government in 1919 and 1921. That was the last time I worked for the Government. I was an aviation mechanic. I am not medically trained.

Policy A, #1191014 for \$10,000 was taken out in October 1925, with the defendant Company. At that time I executed a note for the premium. The note, Plaintiff's Exhibit 1, for \$275.60 is the amount of the premium upon Policy A. The note was for a period of four months, to January 29th. I received the policy in the meantime. I kept the policy in a file in the hospital along with other private papers. The note was not paid on January 29th. Nothing was done towards paying it at that time, it was just carried along. I paid the note at a later time. I paid \$150.00 at one time and the balance in September 1926. I think I paid the \$150.00 in cash, I haven't got that check. The balance I paid in September 1926. Plaintiff's Exhibit 4 is the check, balance due on the note at that time. That paid the premium for the first year. For the second year's premium on Policy A, I executed a note at the time I gave the check. I executed the note in November on that policy. The note is there, Plaintiff's Exhibit 6 for \$275.60, dated November 14, 1926. When the note I gave on September 29th, 1925 on Policy A fell due, I later paid it in two installments. The first installment, I think, in December, and paid the balance in September. Policy A insures me from the 14th of October 1925 for a year. The last note is dated November 14th, 1926. According to that I took the grace period. The

(Testimony of James McCulloch, Jr.)

policy carries a period of thirty days grace. I gave the note on the last day of grace. The second note was due by its terms on February 14th, 1927. The note was never paid. The next policies I took from the defendant Company were policies referred to as B and C. Policy B is for \$15,000 and Policy C is for \$5,000. These policies were written about November 27th, 1925. I got them both at the same time. I gave a note for the first annual premium. Plaintiff's Exhibit 5 is the note payable to the Penn Mutual Life Insurance Company, dated November 25, 1925. The note was due in March 1926, upon policies B and C. All of the notes are payable to the Penn Mutual Life Insurance Company. In giving them it was my intention to pay the premiums on the various insurance policies. The receipt, Plaintiff's Exhibit 2 is for the annual premium on Policy A. It hasn't anything to do with the other policies. The note given in November for \$551.20 was never paid. It was paid in part with the note I gave Don Carrell. I gave the note to Don Carrell because he demanded the note. He said he paid the note to the Penn Mutual Life Insurance Company and wanted to be reimbursed. I understood he paid the Company out of his own pocket. I gave him the note for \$339.39, Plaintiff's Exhibit 8. That note paid in part Plaintiff's Exhibit 5. The note for the \$339.39 is dated the fourth month, 19th day. April 19th. I did not have a settlement on the policies prior to that time. I surrendered the policies to him the day I gave the note. When this happened on April 19th, 1927, Carrell received the note from me, Plaintiff's Exhibit 8. I am pretty sure it was the date I surrendered the policies. He demanded

(Testimony of James McCulloch, Jr.)

that I surrender the policies A, B, C. He told me I had insurance paid up to that time and that cancelled it out. Check, Plaintiff's Exhibit 7 is for \$300.00, given on February 10th, 1927. It bears date February 24th 1927; it was post dated. On February 10th, I made the appointment with Randolph and Son. I had the conversation with Mr. Carrell about the post dated check. I gave the check, Plaintiff's Exhibit 7 to pay on the note, the five hundred odd dollars note. When this check was not good I issued the other note, Exhibit 8. I am not sure the \$399.00 note took up the check, because the check refers to the note itself. The check was paid back to me after I gave him the note. It was my intention to take back the check, not pay both of them. I was engaged in work at the hospital in July 1926 when I first took down with an illness. Dr. Tanner took care of me. With the first illness I was confined in bed to about the middle of September. I went to bed on July 31st and stayed in bed until about the middle of September. I was at home. Dr. Tanner took care of me for that period of time. Dr. Alberty was called in, called in consultation. Dr. Alberty saw me just one time. It was in August. Dr. Tanner pronounced the ailment as pneumonia. Dr. Alberty never told me what he pronounced it. I did not go back to the hospital until some time in November. I was not around the hospital from July until about November. I was at home during that period, lounging around the place after I got out of bed. Dr. Tanner saw me. He took care of me continually then. I went to the hospital once in a while after November. Maybe once or twice in November. I went to the hospital in December. I cannot tell



(Testimony of Chester O. Tanner)

how many times, approximately eight or ten times. I went there in January, I could not tell exactly how many times, approximately eight or ten times—about five or six times. To the best of my recollection it was five or six times. I went to the hospital a few times in February. It might have been four or five times, or a half a dozen times, maybe a little more. In March 1927, I was under a good deal of pressure at that time. I went down to the hospital about a dozen times. It was on March 31st when the bankruptcy occurred and a receiver was appointed and the hospital taken over. March 31st, 1927. I was at home the rest of my time, lounging around and in bed. From July 1926 until March 1927, Dr. Kinney also saw me. He took X-rays of me. I did not have a conversation with Dr. Kinney about my ailment when he took the pictures. It was over a year after he took the pictures. During the period from July 1926 to March 1927 I was weak and sick, and was at home except for the few times I went to the hospital. I applied to the Veteran's Bureau for treatment on July 6, 1927. I do not recollect signing any papers when I surrendered the policies.

CHESTER O. TANNER,

called as a witness for plaintiff testified as follows:

I am a physician and surgeon, licensed to practice in California. (qualifications stipulated)

I had occasion to treat Mr. McCulloch professionally in the summer of 1926. The treatment commenced on August 1st, 1926. He was at home at that time. I made an examination of him to determine his condition. I



(Testimony of Chester O. Tanner)

treated him until about the middle of October 1926, continuously. I made about thirty-five or forty visits during that period. At that time Mr. McCulloch was suffering from tuberculosis. He had tubercular pneumonia. I did not diagnose that upon the first visit. About three weeks after I first visited Mr. McCulloch I determined he was suffering from tuberculosis. At that time I called Dr. Alberty and Dr. Kinney in consultation. I think I told Mr. McCulloch he had pneumonia, but didn't tell him he had tubercular pneumonia. That was from July 1926 to November 1926. I never treated Mr. McCulloch after November 1926. From August 1926 to November 1926 the degree of disability of Mr. McCulloch was total. My prognosis of his condition at the time I stopped treating him in November was very bad. From my observation of him the last time I saw him I thought the condition of his disability would be permanent. I haven't gone over his chest for some time. I have not examined his chest since November 1926. Dr. Kinney delivered to me certain X-Ray plates.

(X-Ray plates offered in evidence by plaintiff and received in evidence.) I have examined the plates. They showed tuberculosis throughout both lungs with fluid at the base of the right lung. I don't think I ever told Mr. McCulloch he was suffering from tuberculosis.

#### CROSS EXAMINATION OF DR. TANNER

BY MR. KUNZEL.

I saw Mr. McCulloch practically every day during August 1926, and about twice a week during the month of September. I saw him practically every day at his home.

(Testimony of Dr. W. M. Alberty)

I didn't see him every day but he was in my care all of that time. I think he got up and went to the hospital two or three times without my permission. I have a record of the visits, but not a detailed record every day. I examined the X-Rays. The nature of the findings were an old chronic tuberculosis throughout both lungs with fluid at the base of the right lung. That tubercular condition was scattered throughout both lung fields. I think the last time I saw Mr. McCulloch was October 15, 1926, until the Veteran's Bureau. I saw him twice when I helped him through the Veteran's Bureau. I think that was early in 1928. I saw him the first day of August and then I saw him almost continually until about October 15th, 1926.

DR. W. M. ALBERTY

called as a witness on behalf of plaintiff, testified as follows:

I am a physician and surgeon and admitted to practice in the State of California. (Qualifications stipulated.) I took my medical education at Kansas University. Have been practicing in California since 1920. I have not specialized in any particular line. I was called in by Dr. Tanner in connection with the treatment of Mr. McCulloch. That was on August 17, 1926. Mr. McCulloch was at his home at that time, in San Diego. We made a diagnosis of Mr. McCulloch's condition then. At the time I saw him he was ill with pneumonia. History of having been ill for two weeks with onset of rather sudden, and history of pneumonia, the findings of pneumonia and fluid at the time I saw him. He had findings

(Testimony of Dr. W. M. Alberty)

in his chest, lung findings in addition to the fluid that caused us to suspect strongly a tubercular pneumonia of a tubercular origin. Subsequently Dr. Kinney was called in to make X-ray pictures. After that I got the pictures and formed our physical findings. The diagnosis of the combination of physical findings and X-ray was plural effusions with fluid in his chest, which we thought probably tubercular. I could say no more definite. I did not continue to treat Mr. McCulloch for a long period of time. That was the only time I saw him, the one time. Mr. McCulloch consulted me again in regard to his illness in January 1929. I made a further examination of him at that time. At that time he had the findings that I considered tubercular. I requested further X-ray study and this was made in February 1929. The combination of the physical findings and the X-ray showed that his chest had healed considerably from the X-ray standpoint, but was not entirely healed. It showed evidence of unhealed lesions. Upon the first occasion of visiting him in 1926, in my opinion, the condition as to his disability was total at that time. His condition was such that it was likely to continue. I could not say whether it would be permanent. Combining it with my examination of him in 1929, I would say the lesions would probably eventually heal, but it would take considerable time. From the condition of his chest in 1929, I thought at that time it would take a year, that is, he could not expect to do duty for at least a year. Between 1926 and 1929 in my opinion, I did not believe he was able to do any work of any kind. This is my opinion as a physician. In the treatment of his condition he refrained from doing any work. I have

(Testimony of Dr. W. M. Alberty)

examined Mr. McCulloch rather frequently since 1929. I saw him within the last month. At the time I last saw him he was progressing. I can find no evidence at present of activity, that is, moisture in the chest. I do not believe he should be doing any physical labor. He should not be doing any labor of any kind. The treatment that is given to him is principally rest. He has been under observation rather frequently. During 1930 he has had two or three respiratory things secondary in nature that required him to be in bed. No definite line of medical treatment but observation and rest and forced feeding as much as possible. Nothing different from the ordinary treatment of cases of this character. At the time I saw Mr. McCulloch about a month ago, in my opinion he is totally disabled at present. I do not believe he should go back to work, where he is exciting himself strenuously. I do not believe there is any kind of constant effort he could put forth at the present without detriment to his physical condition. I am hopeful of a change in that condition sometime in the future. In August and in May 1930 he had a flare up that required strapping, at which time he ran a temperature. X-ray checking at that time showed some softening of his lung tissue, and although his chest findings now show very little, it would not be policy for him to go back this early after that had occurred. I did not tell Mr. McCulloch what he was suffering from, to my knowledge, before 1929. That was the

(Testimony of Dr. W. M. Alberty)

first time I ever informed him of what the diagnosis was as to his condition in 1929. I don't believe I told him anything about his diagnosis when I first saw him in 1926. I was at that time called into consultation by Dr. Tanner.

CROSS EXAMINATION OF DR. ALBERTY  
BY MR. KUNZEL.

I haven't any of the X-rays with me that were taken in 1929 and 1930. I saw him only once, in 1926, in August. I couldn't say definitely how old a lesion he had. The X-ray examination revealed lesions, but we considered healed lesions. I did not make at that time any clinical test more than a physical examination. No sputum tests were made to my knowledge. The clinical examination revealed what we thought was a tubercular condition. I am not qualified to read the plates and interpret them. My physical findings were made upon those and the X-ray findings which were interpreted by an X-ray man and we drew out conclusions. I took the interpretation of Dr. Kinney, the X-ray man. He had old lesions, according to the X-ray report in both lungs. His acute findings were in the right. He had findings in the apex, of old lesions. He had moisture in the right upper lobe. I made those notes of Mr. McCulloch at that time. I find no moisture at this time. The last time I checked his chest he had old lesions still, healed lesions. I doubt if it would be advisable for Mr. McCulloch at this time to do clerical work. I would not want to say that he could do outside work until he was further checked with X-ray study again. The last X-ray study was made in August, 1930, August 25th, 1930. I haven't had any since then.



(Testimony of James McCulloch, Jr.)

JAMES McCULLOCH, JR.,  
PLAINTIFF, RECALLED FOR FURTHER  
CROSS EXAMINATION  
BY MR. GIRLING.

At the time I gave the \$339.39 note to Mr. Carrell, Plaintiff's Exhibit 8, there was a conversation with Mr. Carrell, and I surrendered the policies. As far as I can recollect that was the only time I signed anything regarding the giving up of these policies. I am not sure, but I think it was upon April 19, 1927, somewhere along in there. That is my signature to the paper shown me marked, "Note Policy Surrender", bearing date of March 18, 1927. I have no recollection when I signed this. I did not receive the insurance policy, No. 1191014, Policy No. A which is mentioned as being returned to me on that day in this instrument, when I signed this paper. I believe I had the policy at that time. I might have delivered the policy over to the Company when I signed that. I got the promissory note from Mr. Carrell later. I got that on March 3, 1929 when I went to his office. He also gave me the policy at that time. That is how I came to have it in my possession, he gave it to me. They had it in their possession up to that time. From the time I surrendered it. I got the policy when it was first issued by the Company. I got it back in 1927. I believe it was when I signed this. When I talked with Mr. Carrell a couple of years later he still had the policy and the note and he let me have it back. I believe I surrendered the policy to the Company at the time I signed this. (Photo-



(Testimony of James McCulloch, Jr.)

static copy of instrument offered and received in evidence, marked Defendant's Exhibit A.)

The policy surrender was given up by me and signed on March 18th, and the note to Mr. Carrell was executed on April 19th. That is my signature to the instrument printed "Note Policy Surrender" relating to Policy #1196774, Policy No. B, signed as of December 30th, 1926. As far as I can recall that is the date on which it was signed. That is my signature to another "Note Policy Surrender" relating to Policy #1196773, Policy C, dated December 30, 1926.

(Photostatic copies of instruments offered and received in evidence marked Defendant's Exhibit B, Policy No. 1196774, and defendant's Exhibit C, Policy #1196773.)

I believe I delivered up the policy of insurance referred to in each of these Exhibits when I signed them in December 1926. I was carrying other life insurance policies. I was still a pretty sick man during all this time. That is my signature to the instrument headed at the top "Penn Mutual Life Insurance Company", dated at San Diego, February 14, 1927. (The three Note Policy Surrenders read into the record.)

Defendant's Exhibit A is as follows:

"To be used when the right to change beneficiary is reserved in the policy"

Note Policy Surrender.

"First changing the policy and making it payable to me or to my executors, administrators or assigns, I, the undersigned, for value received, for myself, and as Attorney in Fact for all beneficiaries under the policy, do hereby

(Testimony of James McCulloch, Jr.)

surrender, assign, transfer and set over, all right, title and interest whatsoever of, in, and to policy No. 1191014 on the life of James McCulloch, Jr., in the Penn Mutual Life Insurance Company of Philadelphia, unto the said Company, its successors or assigns, in consideration of receiving from said Company my note for \$275.60, dated the 14th day of November, 1926, given in settlement of annual Oct. Premium on said policy, due the 14th day of October, 1926, this day cancelled and returned to me, and I hereby release the said Company from any liability by reason of the acceptance of the said note.

Witness my hand and seal at San Diego, Cal., this 18th day of March 1927.

Witness present: Don C. Carrell.

Signed James McCulloch, Jr.,”

Defendant's Exhibit B is as follows:

“To be used when the right to change beneficiary is reserved in the policy.

Note Policy Surrender.

“First changing the policy and making it payable to me or to my Executors, Administrators or Assigns, I, the undersigned, for value received, for myself and as Attorney in Fact for all beneficiaries under the policy, do hereby surrender, assign, transfer and set over, all right, title and interest whatsoever of, in and to Policy No. 1196774, on the life of James McCulloch, Jr., in the Penn Mutual Life Insurance Company of Philadelphia, unto the said Company, its Successors or Assigns, in consideration of receiving from said Company my premium note for \$413.40, dated the 25th day of November, 1925, given in

(Testimony of James McCulloch, Jr.)

settlement of annual premium on said policy, due the 27th day of November, 1925, this day cancelled and returned to me, and I hereby release the said Company from any liability by reason of the acceptance of the said note.

Witness my hand and seal at San Diego, Cal., this 30th day of December, 1926.

Witness present: Ada M. Kelley.

(Signed) James McCulloch, Jr."

Mrs. Kelley is bookkeeper and accountant in Mr. Randolph's office, and is the agent here of the Penn Mutual Life Insurance Co.

Defendant's Exhibit C is as follows:

"To be used when the right to change beneficiary is reserved in the policy.

Note Policy surrender.

First changing the policy and making it payable to me or to my Executors, Administrators or Assigns, I, the undersigned, for value received, for myself and as Attorney in Fact for all beneficiaries under the policy, do hereby surrender, assign, transfer and set over, all right, title and interest whatsoever of, in and to policy No. 1196773 on the life of James McCulloch, Jr., in the Penn Mutual Life Insurance Company of Philadelphia, unto the said Company, its successors or assigns, in consideration of receiving from said Company my premium note for \$122.50, dated the 25th day of Nov. 1925, given in settlement of annual premium on said policy, due the 27th day of Nov. 1925, this day cancelled and returned to me, and I hereby release the said Company from any liability by reason of the acceptance of the said note.

Witness: Ada M. Kelley.

Signed, James McCulloch, Jr."

(Testimony of James McCulloch, Jr.)

It is my signature on the instrument dated February 14th, 1927. (Instrument dated February 14th, 1927, offered and received in evidence, marked Defendant's Exhibit D.) (It is stipulated that the policies were not reinstated.)

At the time I offered the application for reinstatement, I tendered that \$300.00 check. My understanding was it was to be applied to the note. I believe I also gave Mr. Carrell a new note at the time for \$530.00. That was about February 14th, 1927. That is when I gave the check for \$300.00. I received the check back at the time I gave Mr. Carrell that note. The \$339.00 note. On the application for reinstatement down to the words "Certificate of health from the Medical Examiner" everything above that is written in pen and ink is in my handwriting. It appears there that I said "Yes" to question No. 3 stated therein "Are you in good health?" I was led to believe I was getting better. I couldn't say I was in good health, I don't know, in fact, I know I wasn't. I know that now. I did not know it then. I had only been able to go to my hospital about five times that month. I was weak. I figured it was just naturally the effect of the sickness that I had been through. I had been in bed from the last of July to the middle of September. I wasn't in bed in November. The next time I was in bed was in April. Between that time up to the time I presented this instrument, I had been to the hospital about four or six or eight times in any one month. It might not have been as often as that. "Q You thought you were in good health? A It might not have been as often as that. Q You thought you were in good health? A Well, I was rest-

(Testimony of James McCulloch, Jr.)

ing up and recovering from my sickness. Q That does not answer my question. You thought you were in good health, Mr. McCulloch? A I thought I was fairly. I was under that impression."

Defendant's Exhibit D read into the record and is as follows:

"The Penn Mutual Life Insurance Company, Philadelphia, Pa.

Upper portion of health certificate, including agent's statement is required.

For conversion of Optional Term Policies within thirty-one days after the time limit for the conversion of such policies has expired.

For adding double indemnity within five years of date of issue.

Full health certificate is required:

(a) For revival of policies when the premium is delinquent more than sixty days from premium date. Insured to pay fee.

(b) For additional insurance sixty days after and within six months of date of last examination. If the total amount is over \$30,000, a specimen of urine to the home office. For a total amount in this Company exceeding \$50,000 see "Requirements for Single and Double Examinations and Microscopies" Fee to be paid by Company.

(c) For conversion of Optional Term Policies after thirty one days after the time limit of conversion for such policies has expired. Fee to be paid by the Company.

(d) For adding Waiver of Premium, Disability Annuity after sixty days from date of last examination. Insured to pay fee.



(Testimony of James McCulloch, Jr.)

(e) For adding double indemnity, five or more years after date of issue. Insured to pay fee.

(f) For putting new policy in force after sixty days and within six months from date of original examination.

(g) For change of plan from a higher to a lower premium form after sixty days from date of last examination. Insured to pay fee.

(h) For purchasing additional paid up insurance of not more than \$1,000. Insured to pay fee.

I hereby request and certify that the answers to the following questions and the statements and answers contained in part 11, statements to Medical Examiner, dated .....shall be considered as a part of and an amendment to my application for Policy No. 1196773-4 in your Company, made the 24th day of Nov. 1925.

1. For what purpose is this certificate furnished?

Then in filling in the blank for reinstatement.

2. Has there been any change in your family record since the above date? Give details? No.

3. Are you in good health? Yes.

4. Have you lost a foot or a hand? No.

5. Have you had any sickness or injury since the above date? Give full details. Yes.

6. Have you any defect in hearing? No.

7. Have you any impairment of sight in either eye? If so, is the vision in other eye normal? State full particulars. No.

8. Has there been any change in your use of intoxicating liquors or drugs since the above date? No.

9. a. Have you, since the date of your application, applied to any company or agent for insurance without



(Testimony of James McCulloch, Jr.)

receiving a policy of the exact kind and amount applied for? No.

b. Are any negotiations for insurance now pending or contemplated? (If so, state full particulars, including amount of disability benefits.) No.

10. What is your present residence address? (give street and number) 4275 Ingleside Ave.

11. a. Have you ever taken an aeroplane flight? (Give details, if so, how many flights in each of last three years?) No answer.

b. Do you contemplate doing so?

No answer.

12. What is your principal occupation? Supt. Hospital.

b. What is your other occupation? None.

c. Exact duties? No answer.

d. Name of employer? Self.

e. Give business address. 914 Beach St., San Diego.

13. State below the total amount of insurance on your life. Company. Amount of Life Insurance, Disability benefits per Month. Accidental Death Benefit.

Below that the words "See Record"

State what amount if any is corporation insurance? no answer.

Then below.

I hereby certify that my health is not impaired; that I have not consulted a physician during the past three years, except as stated above, and I hereby declare that my answers to the foregoing questions are full, complete and true, and are made for the purpose of inducing the Penn Mutual Life Insurance Company to comply with the re-

(Testimony of James McCulloch, Jr.)

quest as stated in answer to Question No. 1 hereof, and it is understood and agreed that no liability on the part of the Penn Mutual Life Insurance Company shall arise under this health certificate until it has been approved at the home office of the Company in the City of Philadelphia, Pennsylvania, and the premium has been paid, during my lifetime and good health. Dated at San Diego, this 14th day of Feb. 1927.

Witness present, H. S. Anderton, M. D.

Signature of applicant, signed James McCulloch, Jr.

#### AGENT'S STATEMENT

"I am personally acquainted with James McCulloch and believe his answers to the above questions are true.

Signature of Agent blank.

General Agent (signed) C. L. Randolph.

Then below:

#### CERTIFICATE OF HEALTH FROM THE MEDICAL EXAMINER.

THIS IS TO CERTIFY, that I have this day carefully examined Mr. James McCulloch of San Diego, Calif. at 2:30 P. M. above referred to with the following results:

14. Are the heart sounds normal and is the action regular? Yes. What is the pulse rate? 76.

15. Are the lungs free from abnormalities? Yes.

16. Height 5 ft. 8½ in. Weight 130 lbs. Chest expanded 33 in. Abdomen 29.

17. What is the blood pressure? Sys. 122. Dias 80.

18. Urine. A. Specific gravity 1014 B. Albumin Neg. C. Sugar Neg. D. Was the urine passed in your presence? Yes.

(Testimony of James McCulloch, Jr.)

19. Examination of woman is left blank.

20. Has any near relative, uncles, aunts and grand parents included, had tuberculosis (consumption), insanity, apoplexy or Bright's disease? Explain fully. No.

21. Does his occupation expose him to any hazard from poison, dust, abnormalities of temperature, dampness, infection or accident? If so, explain fully on back. No.

Then the remarks.

Dated at San Diego, Calif. this 14th day of Feb. 1927.  
Signature of Examiner (Signed) H. S. Anderton, M. D."

Under the lower right hand side:

"Lobar pneumonia, July 1926—2 mo. disability, complete recovery. No complications. Dr. C. O. Tanner, 1st. Nat'l. Bank Bldg., San Diego, Calif.

I had other insurance and I made application for disability under it. In the Metropolitan Company.

I believe I signed the instrument dated June 13th, 1927 headed at the top "Metropolitan Life Insurance Company".

(Photostatic copies of the instrument offered and received in evidence, marked Defendant's Exhibit E) and is as follows:

"METROPOLITAN LIFE INSURANCE COMPANY.  
Claim Division—Disability Section. Form 0343. May  
1926.

APPLICATION FOR TOTAL AND PERMANENT  
DISABILITY BENEFITS.

STATEMENT OF CLAIMANT.

This statement must be completed by the insured. If the insured is mentally incompetent, the statement should

(Testimony of James McCulloch, Jr.)

be completed by the Guardian or Committee, or if none has been appointed, then by the beneficiary named in the policy.

1. Full name of insured. James McCulloch, Jr.,  
2. Present *resident*. No. 4275 Street, Ingleside Ave.,  
City, San Diego, State, Calif.

3. State number of policy under which claim is made.  
#1157497A.

(a) If insured under any other policies issued by this company state the numbers. #1739486-A

4. Date of birth. Dec. 6, 1893.

5. Give the date of injury or beginning of illness causing present condition—about April 10, 1927.

6. Give name of illness or cause of injury and describe fully present condition. Influenza with fluid.

7. Name and address of last employer? Self.

8. State exact duties of occupation. Hospital superintendent.

9. Date quit work. No answer.

Give the reason. No answer.

10. Has any work been performed since commencement of present affliction? No.

11. When is it expected that work may be resumed? Three to six months.

12. Give names of all physicians who have attended and dates of such attendance.

NAME	ADDRESS	DATE
T. Maud Ramer, M. D.	526 Electric Bldg.	From 4/9/27 to 4/9/27
E. Blanch Ramer, M. D.	526 Electric Bldg.,	From 4/9/27 to 6/13/27
J. A. Parks, M. D.,	Electric Bldg.	consultation 5/15/27 and 5/17/27.

(Testimony of James McCulloch, Jr.)

13. State if sick benefit, allowance, or pension is received, from any other source. No. If so, give name of Company or Association. Left blank.

Sworn to before me this 13th day of June, 1927. Wilhelmine Schaffiet, Notary Public.

Signature of insured, James McCulloch, Jr.

Residence, No. and Street, 4275 Ingleside.

City, San Diego, Calif.

I had T. Maud Ramer, physician, 526 Electric Bldg., of San Diego, prepare a statement for it on June 13, 1927. I saw that statement. This is the statement (showing statement to witness). That is part of the application to the Metropolitan, that is the one that was rejected.

(Photostatic copy of statement read into record.)

METROPOLITAN LIFE INSURANCE COMPANY  
—Claim Division—Disability Section, Form 0345.

APPLICATION FOR TOTAL AND PERMANENT  
DISABILITY BENEFITS STATEMENT OF AT-  
TENDING PHYSICIAN.

1. Full name of insured. James McCulloch, Jr. Age 34.

2. Residence, 4275 Ingleside Avenue.

3. State cause of injury or infirmity or name the disease or illness. Influenza with *Pluresy* and Effusions.

4. On or about what date were you first consulted? April 9, If insane, give date of commitment. No answer.

5. Are you attending at the present time? Yes. If not, give date of your last attendance. No answer.

6. How long was patient confined to the house? Confined to bed at present.

(Testimony of James McCulloch, Jr.)

7. If not confined to the house, state whether able to perform work of any kind.

8. Give diagnosis and symptoms in detail. Severe case of influenza accompanied marked prostration—which is spelled p r o s t a t i o n. Temp. 106 deg. Rapid respiration dypnea—dullness over left lung up to and above 7th rib—fluid on aspiration.

9. When did patient first show the symptoms of present illness? 5 days—3 weeks previous.

10. Describe in detail the exact condition at the present time. Convalescing slowly. Marked loss of weight—rapid—dilated heart, temperature every afternoon.

11. What is the prognosis? Guarded.

12. Is patient totally disabled at the present time and wholly unable to perform any work or engage in any business? Yes.

13. How long has the patient been continuously and totally disabled? April 6th.

14. If totally disabled at the present time, will such total disability be permanent? No.

15. If the total disability will not be permanent, when may work be resumed? 3 to 6 months.

Physicians are requested to give full information. If desired, additional comments may be made on the reverse hereof under "REMARKS".

Sworn to before me this 13th day of June, 1927.

Wilhelmine Schaeffiet, Notary Public

Signature of physician, T. Maud Ramer.

Residence No. and Street, 526 Electric Bldg., City of San Diego, State of California.

This statement must be sworn to before an officer duly authorized to administer oaths, and seal impressed hereon.



(Testimony of James McCulloch, Jr.)

Claimants are bound to produce at their own expense such medical testimony as may be required by the Company."

Exhibit (Defendant's F,) dated June 13th, 1927. Exhibit E refer to both policies. Number of policies under which claim is made 1157497A & 1739486-A.

The next referred to as Exhibit G, and is as follows:

"METROPOLITAN LIFE INSURANCE COMPANY, CLAIM Division—Disability Section. APPLICATION FOR TOTAL AND PERMANENT DISABILITY BENEFITS. STATEMENT OF CLAIMANT.

1. Full name of insured. James McCulloch, Jr.
2. Present residence. 4275 Street, Ingleside Ave., City, San Diego, State, California.
3. State number of policy under which claim is made. 1157497A and 1739486A.

(a) If insured under any other policy issued by this Company, state the numbers. None.

4. Date of birth. December 6, 1893.
5. Give the date of injury or beginning of illness causing present condition. Confined to bed April 20, 1927.
6. Give name of illness or cause of injury and describe fully present condition. Pleuresy with effusion and tuberculosis puln. (pulmonary) Feeling of weakness, tires easily, loss of weight and afternoon temperature.

(Testimony of James McCulloch, Jr.)

7. Name and address of last employers. Self.

8. State exact duties of occupation. Hospital manager.

9. Date quit work. April 3/27.

10. Give the reasons. Business reasons. Has any work been performed since commencement of present affliction? None.

11. When is it expected that work may be resumed? Do not know.

12. Give names of all physicians who have attended and dates of such attendance.

Name	Address	Dates.
E. B. Ramer, M. D.,	Electric Bldg., San Diego, Cal.	4/20/27 to 7/6/27
M. E. Ramer, M. D.,	Electric Bldg., San Diego, Cal.	4/20/27 to 7/6/27
J. A. Parks, M. D.,	Electric Bldg., San San Diego,	in consultation.
F. C. Pache, M. D.,	1233 Lincoln Ave., San Diego,	7/6/27 to date.

13. State if sick benefit, allowance, or pension is received from any other source. None.

Sworn to before me this 10th day of August, 1927.

O. E. Mark, Notary Public. Signature of insured,  
James McCulloch, Jr.

Residence, No. and Street, 4275 Ingleside, City, San Diego, State, Calif.

(Defendant's Exhibit G received in evidence.)

DEFENDANT'S EXHIBIT H, offered and received in evidence, and is as follows:

(Testimony of James McCulloch, Jr.)

“METROPOLITAN LIFE INSURANCE COMPANY, Claim Division—Disability Section. Form 0345, December 1926. Printed in U. S. A.

APPLICATION FOR TOTAL AND PERMANENT  
DISABILITY BENEFITS. STATEMENT OF AT-  
TENDING PHYSICIAN.

1. Full name of insured. James McCulloch, Jr., Age 34.

2. Residence, 4275 Ingleside St., San Diego, Cal.

3. State cause of injury or infirmity or name the disease or illness. (1) Tuberculosis Pulm.

Pulmonary, I take it.

Chronic active. (2) Pleuresy with effusion.

4. On or about what date were you first consulted? July 6, 1927. If insane, give date of commitment.

5. On what date were you last consulted? July 15, 1927.

6. How long was patient confined to the house? Do not know as claimant first seen by me on 7/6/27.

7. If not confined, state whether able to perform work of any kind? Unable to work—Should be in hospital.

8. Give diagnosis and symptoms. (Please describe in detail.) Weakness. Tires easily. Cough and expectoration. Loss of weight. Dyspnoea. Afternoon temperature and rapid pulse. Poor appetite. Appears chronically ill. Pale color. Emaciated. Pulse 108 (seated) Temp. 37.2 degrees centigrade. Height, 67 3/4. Weight 119-1/2. Exam. of chest. Moderately long, broad and flat. Mobility impaired. Expansion unequal. Left legs markedly. Fremetus increased. Diminished resonance.

(Testimony of James McCulloch, Jr.)

Rt. 3rd rib to 5th Dorsal spine up. Dorsal left, 3 rib, 5th Dorsal 5 up. Dullness right base to 5th Dorsal spine. Dullness left base to 7th Dorsal spine. Increased voice conduction. Right 3rd rib and 5th Dorsal spine up. Medium moist rales over both. I. V. C. and R. V. B. Left 3rd rib 5th Dorsal spine up. Pleuresy with effusions upper lobes absent breath sounds over left base tub. left pleura.

Diagnosis. Tuberculosis Pulm. Active.

9. When did patient first show symptoms of present illness? Do not know.

10. Describe in detail the exact condition at the present time. See 8. Patient has active pulm. tuberculosis with cavitation in upper left lobe, with *pluresy*, fib. chr. & effusion in left pleura. 150 cc of fluid estimated. Findings confirmed by X ray.

11. What is the prognosis? Guarded.

12. Is patient totally disabled at the present time and wholly unable to perform any work or engage in any business? Yes.

13. How long has the patient been continuously and totally disabled? Cannot state definitely but would estimate at least six months from present condition.

14. If totally disabled at the present time, will such total disability be permanent? From history of case and findings, total disability will probably continue indefinitely.

15. If the total disability will not be permanent, when may work be resumed? Aug. 24, 1927. O. K.

Physicians are requested to give full information. If desired additional comments may be made on the reverse hereof under "remarks".

(Testimony of James McCulloch, Jr.)

Sworn to before me this 8th day of August 1927, John A. Hewicker, Notary Public. Signature of Physician, F. C. Pache, M. D., Residence, No. and Street, 1233 Lincoln Avenue, City, San Diego, State, Calif.

This statement must be sworn to before an officer duly authorized to administer oaths, and seal impressed hereon. Claimants are bound to produce at their own expense such medical testimony as may be required by the Company.

See later statements attached 3/22/28 and 3/28/28.

On May 15th, consultation with Dr. J. A. Parks, Chest aspirated. Diagnosis treatment confirmed, bearing no signature.

I was called down to the District Attorney's office, about the check and I had a letter. It was about this check inasmuch as it was placed there. It did not ask me to come down about anything else at that time, the letter was not about that check at that particular time. I do not have the letter or a copy of it. I received two or three from down there. I think Mr. Cornell signed the letters. I am not sure, it was so long ago. All of the letters did not relate to this check. Just one letter. I do not recall what he said, but he told me to come down there. I talked to Mr. Cornell when I went down there. It was at the District Attorney's office. We were alone. I think I went down there sometime in March. It was before I surrendered the policy. It was before the 18th of March. I believe it was. Mr. Cornell and I had a conversation. He told me he had a check here and he wanted to know what I was going to do about it. I told him I couldn't do anything, and he told me these people would press a charge against me. Mr. Randolph would

(Testimony of James McCulloch, Jr.)

press a charge against me. I told him the check was post dated and I didn't see how he could do anything about it. He said they claim it was not post dated, whoever turned the check in. Either Mr. Randolph or Mr. Carrell who brought the check up there. I couldn't state definitely who brought the check there. I do not know of my own knowledge. It was the Randolph check, so it must have been someone out of their office who brought it there. He did not mention their names. Cornell told me that Carrell claimed it was not a post dated check, but he did not tell me who brought the check there. I do not know. He told me these people would prosecute me. He didn't tell me who they were, but I could figure out who they were. He didn't tell me whether it was Bill Jones or Tom Smith. He did not mention any names at all.

(Stipulated that there were filed offer of proof of disability on behalf of plaintiff relative to a certain life insurance policy in the Acacia Mutual Life Association.)

Defendant's Exhibit I offered and received in evidence, and is as follows:

ACACIA MUTUAL LIFE ASSOCIATION. Disability proof.

STATEMENT OF OFFICER OF MEMBER'S LODGE OR OTHER MASTER MASON, WHO KNOWS MEMBER PERSONALLY.

"1. What is your name, address and occupation? 4440 St. San Diego. (I think that is 44 40th St.) Teacher.

2. The following answer relates to the claim for total and permanent disability made on behalf of Bro. James McCulloch, Jr.



(Testimony of James McCulloch, Jr.)

3. How long have you known the member? 12 years. If claim is made by another person on behalf of the member, do you know the claimant?

4. Read the statements of the claimant, the attending physician and state whether they are correct and complete according to your knowledge and belief? A. Yes.

5. (a) Please state in detail member's present condition of health and symptoms? A. Very much under weight, weak, unable to do any work.

(b) Is he now confined to his bed or house? Give particulars. A. No. Is required to take rest in bed every day.

(c) If not, when was he last confined to his bed or house? A. October 1927.

6. (a) Is the member able to do any work for compensation. A. No.

(b) If so, by whom employed and how?

(c) When was he last employed, by whom and how? A. April 1927, by himself.

(d) If unable to work for compensation at present, how soon, in your opinion, do you believe he will be able to work again? A. Very uncertain.

(e) Is the member's state of health growing worse? A. Improving slightly under present conditions.

(Signed) James N. Sexton."

That is his signature.

"State of California,  
County of San Diego, ss.

On this 23rd day of April, 1928, personally appeared before me, the above named James N. Sexton, to me

(Testimony of James McCulloch, Jr.)

known and made oath that the foregoing statement by him made and subscribed are true and full to the best of his knowledge and belief.

O. E. Mark,

Notary Public.

My Commission expires..... Form 452-B-1-M-11-28-25.

ACACIA MUTUAL LIFE ASSOCIATION. Disability proof.

STATEMENT OF ATTENDING PHYSICIAN IN CONNECTION WITH CLAIM FOR DISABILITY BENEFIT UNDER POLICY OF INSURANCE ISSUED BY THE ACACIA MUTUAL LIFE ASSOCIATION.

1. Name of member. James McCulloch, Jr.
2. Date and place of member's birth? December 6, 1893, Baltimore, Md.
3. Member's residence and address. A. 3768 Eagle St., San Diego, Cal.
4. Member's latest occupation. Superintendent McCulloch Hospital, San Diego.
5. What is the nature of member's present ailment or disability? (1) Pulmonary tuberculosis, active. (2) Pleuresy, Fibroid chronic.
6. What was the date when the ailment or injury causing this disability began? A. I do not know.
7. State the (1) cause, (2) extent, (3) severity, and other (4) particulars of the disability, with an account of the course of the case from the beginning.
  - (1) Cause cannot be definitely stated by me.

(Testimony of James McCulloch, Jr.)

(2) Extent, infiltration of fibrosis of both upper lobes. Pleurisy both bases.

(3) Severity, moderately advanced.

(4) Claimant was examined by me on July 6, 1927 and found to have active pulmonary T. B. and pleurisy with effusions, left base. Has been under observation and examination. Show definite improvement with disappearance of effusion. Clinical findings have been confirmed by X rays.

8. What is the member's present condition? Improved. Clinical examinations have shown decreasing activity in the lungs and general improvement. Has low grade activity at present.

9. What is the degree of member's present disability? Totally disabled for any work at present.

10. At what date did total disability begin? (1) Since July 6, 1927 from personal observation at date first seen, but according to history of the case, since April 9, 1927 when he was confined to his bed.

11. Is member confined to his bed or home? No. Takes regular routine bed rest during day. Three hours in the afternoon.

12. What will be the probable future course and outcome of the case? The prognosis is necessarily guarded, but judging from the improvement made since July, the outlook for arrest is favorable.

13. What are the prospects of improvement, recovery, or lessening of the disability? (1) Prospects for continued improvement are good for recovery, and lessening of the disability, the prospects are favorable.

(Testimony of James McCulloch, Jr.)

14. How long have you been in attendance on the case? Since July 6, 1927.

15. What previous illnesses, ailments, or injuries have the member had? According to statement of claimant he has had influenza and lobar pneumonia in 1926. Fracture of the radius and ulna above right wrist in 1911. Complete recovery of fracture.

16. What circumstances or previous illnesses have there been that might have had a bearing on the member's disability? Attack of influenza and pneumonia in 1926.

17. Gives names and addresses of other physicians who have been in attendance or consultation in the case? Do not know former physicians in attendance on the case. Have not seen patient in consultation with former private physicians.

(Signed) F. C. Pache, M. D.

P. O. Address: 1233 Lincoln Ave.,  
San Diego, Calif.

State of California,  
County of San Diego, ss.

O. E. Mark, on this 28th day of March, 1928, appeared before me, F. C. Pache, M. D. personally known to me as a practicing physician and made oath that the answers and statements above made and subscribed to by him are true and full, to the best of his knowledge and belief.

(Seal)

(Signed) O. E. Mark, Notary.

My commission expires.....

Form 452-A-1M-11-28-25."

(Testimony of James McCulloch, Jr.)

Defendant's Exhibit J.

"ACACIA MUTUAL LIFE ASSOCIATION, Home Office, Homer Bldg., 601 13th St. N. W. Washington, D. C.

"Notice and Proof of Disability Claim, under policy No. 103467 issued by the Association, on the 1st day of October 1922, insuring the life of James McCulloch, Jr., of San Diego, Calif., in the sum of \$5,000.

1. Full name of member. James McCulloch, Jr.

2. Date and place of birth? Baltimore, Md., Dec. 6, 1893.

3. Occupation of member at the time policy was issued and since that date. State exact duties and date of changes, if any. Hospital Manager.

4. Give places of residence of member since date of policy. 4074 Hillcrest Dr. 4275 Ingleside Ave., and 3768 Eagle St., all in San Diego, Calif.

5. Give complete history of all sicknesses that member has had since date of policy. Was taken down the pleurisy with effusion July 31st, 1926. Was confined to bed until October 15, 1926. April 10, 1927 was taken down with pleurisy with effusions and tuberculosis pulm.

6. (a) When did member's health first begin to be affected? Not Noticeable until 7/31/26.

(b) When did member become totally disabled? April 10, 1927.

7. Is member now wholly confined to his bed? Give particulars. No. Am required to take three hours rest in bed each afternoon.

8. (a) Is member now wholly confined to his house? Give particulars. Am up and about part of each day.

(b) If not, when was member last confined to his bed or house? October 20, 1927.

(Testimony of James McCulloch, Jr.)

(c) Is member unable to pursue any gainful occupation. Unable to do any work at all.

(d) If so, in what manner?

(e) If unable to pursue any gainful occupation at present, how soon will member be able to resume business? Do not know.

(f) Is there any improvement in his state of health? Am feeling slightly improved.

9. Give every particular regarding his illness? See No. 5, pulmonary tuberculosis—active.

10. Has he ever used liquor habitually, or to excess? No.

11. What physician or physicians attended or prescribed for the member during the last two years? C. O. Tanner, M. D., W. M. Alberty, M. D., E. B. Ramer, M. D., E. M. Ramer, M. D. and F. C. Pache, M. D., under whose care I am at present, and J. C. Parks, M. D.

12. What other insurance is there on member's life? State Companies, amount of Insurance in each and date issued. Metropolitan Life Insurance Company, \$1,000, 3/22/16, Metropolitan Life Insurance Company, \$15,000 6/5/24/

I, the undersigned hereby declare that the foregoing answers are full, correct and true; that no material fact relative to the condition of the health of the person of James McCulloch, Jr., insured under policy No. 103467, issued by the Acacia Mutual Life Association has been withheld. If this claim is not made by the member himself, state here why and in what capacity you have made the claim.

(Signed) James McCulloch, Jr.,  
Signature of claimant.



(Testimony of James McCulloch, Jr.)

State of California,  
County of San Diego, ss.

On the 28th day of March, 1928, personally appeared before me, James McCulloch, Jr., to me known to be the person whose signature is attached to the foregoing proof of claim and made oath that the statements contained herein are true and complete to the best of his knowledge and belief.

(Signed) O. E. Mark,

Seal.

Notary Public.

My commission expires.....”

I filled in this blank myself. They were filled out by me and the doctor at the same time and sent in together. He got the information from his own examination and from information that I gave him. The policy of the Acacia was taken out in 1922. The Metropolitan policies were taken out in March 1916 and I think in 1924. The Acacia policy and the Metropolitan policies were taken out before I took out the policies with the Penn Mutual Life Insurance Co.

I do not have the letter or letters which I received from the District Attorney's office. I am not sure whether the letter you show me, dated March 7th, 1927 is the letter I received. I am not sure that the copy of letter dated March 16th, 1927 is the letter I received. I received three or four letters from the District Attorneys Office which occasioned my going there. I went there two or three times. The first call I made was in reference to this check. I made other calls after that but not relating to that check.

(Testimony of James McCulloch, Jr.)

### REDIRECT EXAMINATION

BY MR. MONROE

On the occasions that I made the trips to the hospital I would sit in the office just an hour or so. I was not able to stay all day. I was not able to do any work at those times. The first application that I made to the Metropolitan Life Insurance Co., they rejected the claim they disallowed it as total disability claim, they allowed the second one, the Acacia claim was allowed. The second application is signed by Dr. Pache, July the 6th was the first contact I had with Dr. Pache. I went there the day I made application for hospitalization from the veterans hospital. Dr. Pache examined me for both purposes. I first learned that I was suffering from tuberculosis when he told me at that time. After he told me that I went to Dr. Kinney's office and asked him what the first X Rays showed. I think that was in October, 1927.

### RECROSS EXAMINATION

BY MR. GIRLING.

I had the Acacia policies and the Metropolitan policies longer than I had the Penn Mutual Life Insurance policies. I filed claims for disability under both Acacia and Metropolitan. I had the Acacia policy since October 1922. That was for \$5,000. I took out the two Metropolitan policies, one of them in New York City in 1916, they were for \$1,000 and \$15,000. I filed proof for disability and claims for disability under both policies. I did not file with the Acacia and the Metropolitan claiming disability from 1926. I did claim disability from the Metropolitan in 1926 (1927). At the time I filed these claims in the Metropolitan and the Acacia I did not have the Penn Mutual policies. It was after they had been taken up.

(Testimony of Anna R. McCulloch)

ANNA R. McCULLOCH,

a witness on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION  
OF ANNA R. McCULLOCH

BY MR. MONROE.

I am the wife of plaintiff. I was his wife in 1925. He was taken sick July 31, 1926. He had a temperature of about 104 and had a terrific chill before he came home and I put him to bed. The doctor came in and examined his throat. He felt he had a throat infection which he did have. The doctor prescribed for him and his temperature came down. He felt better in a day or two and he insisted on getting up and going down to his place of business, the McCulloch Hospital. He came home that evening and he had another terrible chill and rising temperature, it went to 106. We called a doctor again and he told him he must stay in bed, which he did. He was in bed from about August 3rd, until way on in September. He might sit up for half an hour. He was in a state of absolute prostration. He lost weight until there was nothing much to him but skin and bone. He had terrific night sweats, so the linens had to be changed three or four times a night. His underclothing was changed about six times. He could hardly turn over. I learned he was suffering from tuberculosis, but I did not tell him. He was not told during that time that he had tuberculosis. After he got up in September he would tire easily and had a rapid pulse. Pulse around 100. It would run 120 or 130 on any slight exertion. Going up a flight of steps he would have to sit down. He was next taken to bed

(Testimony of Anna R. McCulloch)

in April 1927. He went to the hospital some during these periods of time. He did not go very often, but he did go. On those occasions he was usually home before noon. At that time I did not know anything about these insurance policies. During that time Mr. Carrell was coming to the house and getting in touch with Mr. McCulloch, but I did not seem to know what it was about, and because he was recovering from this sickness I did not harass him by asking questions. When he was taken sick in April 1927, he stayed in bed about a month. Then he began to get up for forenoons and go back in the after noons for probably another months. Since that time he was subject to colds and he would often stay in bed for a day or two, and on two or three occasions he would be in bed for a week or ten days. He was last confined to bed about a couple of months ago. He was in bed six or seven days. During all that period of time he was not conducting business nor has he done any work. Since he got up from the attack in April 1927 he tires easily, he cannot walk fast and would get a rapid pulse if he would climb stairs or go up grade. His appetite is not good. If he exerted himself his pulse would be quick and it would make him stop. A kind of pallor would come over him. He still takes rest periods during the day during the last few months.

#### CROSS EXAMINATION

BY MR. GIRLING.

Mr. McCulloch and I were not married when he worked for the Government. I recall when he filed application for hospitalization with the Veterans' Bureau. (It is stipulated it was the time the second application was made

(Deposition of Dr. Lyle C. Kinney)  
to the Metropolitan.) It was following the attack of  
April of that year. I never saw the life insurance poli-  
cies that are involved in this law suit. He kept them in  
his private papers, I believe. I was not with him when  
he surrendered them to the Company.

## REDIRECT

BY MR. MONROE.

Mr. McCulloch learned that he had tuberculosis in July  
1927. I knew of him receiving that information. As  
far as I know no one informed him prior to that time. I  
am sure they did not.

DEPOSITION OF DR. LYLE C. KINNEY  
OFFERED IN EVIDENCE BY MR. MONROE.

I am a physician and surgeon. I am a graduate of the  
University of Pennsylvania in 1908, and have practiced  
medicine since 1915 in San Diego, specializing since 1915  
in X-Ray. I am acquainted with James McCulloch, Jr.  
I think I first had contact with him before the war. I  
have no way to date that. I have taken repeated films of  
his chest in the past four years. The first films I have  
a record of are August 18, 1926. He was in bed at that  
time and Dr. Tanner sent us out to take films of his chest.  
The films which I have here are the films which I took at  
that time. I did not make a physical examination and diag-  
nosis of Mr. McCulloch at the time I took the films. I  
made an examination and diagnosis from the films which  
I took. The diagnosis was that he had fibroid tubercu-  
losis at both apices, also fluid at the base of the right  
chest. From that examination I could tell the tubercu-  
losis had lasted for some time, either months or years.

(Deposition of Dr. Lyle C. Kinney)

The fluid being a question of days or weeks. I have taken pictures of Mr. McCulloch since. The last two were taken in 1930, but we had two or three other examinations in the interval. There was change in his condition. The fluid disappeared but the tuberculosis in both upper lobes has persisted. For two years following August 1926 he had from an X-Ray standpoint definite active tuberculosis in both upper lobes and of sufficient severity to warrant his being under active treatment all that time. I would say he is totally disabled with tuberculosis.

#### CROSS EXAMINATION

BY MR. KUNZEL.

I took the first two films on August 18th, 1926. The findings were reported to Dr. Alberty. He was consulting with Dr. Tanner. I don't know that I conveyed my findings to James McCulloch. I would say that I did not because the usual procedure is to make a report to the doctor and leave it to him as to how much the patient is told. I knew Mr. McCulloch personally at the time. I did not talk with him at this time with regard to his condition. Within a year from August 1926 I am sure that I talked Mr. McCulloch's condition over with him. I can't give a closer date because that is four years ago. I met Mr. McCulloch occasionally. I conveyed my findings to Dr. Alberty in writing. I have the original report here. Dr. Alberty lives in San Diego at present.

#### REDIRECT EXAMINATION

BY MR. MONROE

I am not sure that Mr. McCulloch asked me concerning his condition. My recollection is that at some time subse-



(Deposition of Dr. Lyle C. Kinney)

quent to the first examination or the taking of the first pictures I did have some talk with him. The paper which I have shown counsel is a copy of the original report which I handed to Dr. Alberty. (Report offered in evidence and copied in the record.) I took the Xray pictures personally. The pictures which I have identified are the original pictures.

The following is the report.

“Courtesy Name McCulloch James. Address 4275 Ingleside. Referred by Dr. Alberty. Account N. C. Dated 8/18/26. No. 15557

Date	Examination	Films and exposure
		8'X 10 - 11X14 - 14X17 D. F.
	Portable Chest	Drs. Kinney & Elliott

“The left upper lobe shows fibroid infiltration extending from the apex down to the third rib. There are many small points of calcarious density in this area and there is thickened pleura above it.

This same infiltration obtains in the inner border of the upper right lobe. There is thickening of the pleura over the right chest and of the upper inter lobar septum. At the right base in the axilia there is an opaque area 10CM in diameter that has the density of fluid.

The findings at the apices are those of an old fibroid tuberculosis. There is evidence of fluid at the right base.”

Plaintiff rests.

(Testimony of Dr. Herbert Steff Anderton)

DR HERBERT STEFF ANDERTON,

a witness for the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. KUNZEL.

I am a doctor, have been practicing 21 years. I graduated from the University of Maryland. I specialized in pulmonary tuberculosis for about four or five years. I specialized at the California Sanitarium, at Del Mar, California. Subsequent to that I was on the tubercular consulting board in France for about a year. I did nothing but chest work. I am acquainted with James McCulloch, Jr. I have known him ever since he opened the McCulloch Hospital. His mother formerly owned it and ran it, and he took charge of it a good many years ago. That is my signature at the bottom of an application for reinstatement dated February 14th, 1927. I at that time examined Mr. McCulloch. (Referring to Defendant's Exhibit D) I made no clinical findings whatever as to existing T. B. I did not have X-rays before me. At that time my impression was that Mr. McCulloch had completely recovered from lobar pneumonia which he had in July 1926. His condition was perfectly healthy. I saw Mr. McCulloch between July 1926, and April 1927 at the McCulloch Hospital. It is difficult to state how often I saw him. I had patients there. It was a general hospital. He was the owner. I couldn't say how long he had operated it. It was a small private hospital, about 25 or 30 beds. It had existed for several years. After he recovered and returned to the hospital, I saw him every day. He was up and around and performing

(Testimony of Dr. Herbert Steff Anderton)

his usual duties. At the time I examined him he was performing his usual duties. I couldn't say the approximate date of his recovery. At the time I examined him in February, 1927, it was my understanding and impression he was performing his usual duties at the hospital. He also maintained that he was in perfect health.

#### CROSS EXAMINATION

BY MR. McKEE.

I feel myself competent to read X-ray pictures. (Plaintiff's Exhibits 12 and 13) show fluid in the base of the lung, and also some fibroid for deposit at the apices with calcareous deposits, which are the X-ray findings which you find in the apices of both these lungs, you can find in many, many supposedly normal individuals. My diagnosis from the X-ray is an unresolved pneumonia fluid. I would not make a diagnosis of active tuberculosis. The distinction between active and inactive tuberculosis is a mottling of your picture. It is difficult to state whether the patient of whom these pictures are taken had ever had active tuberculosis. The X-ray findings which are not correlated by clinical findings prove very little in chest conditions. I went by a combination of the clinical findings and the X-ray. I never saw any X-ray plates of Mr. McCulloch until this morning. I presume these are the X-ray plates of his. I never had any X-rays prior to the time I examined them on the stand. Never saw any. I couldn't say when Mr. McCulloch recovered, but I saw him around the hospital at the time, and sometime previous to the time I examined him for reinstatement. That was at the time and prior thereto that I made this examination in February 1927. I couldn't definitely state

(Testimony of Dr. Herbert Steff Anderson)

how long it was before this that I saw him around the hospital. I think he was away from the hospital several months during 1926. I couldn't say definitely what months. I couldn't say I was at the hospital every day. I didn't say I saw him every day. I saw him on occasions. Mr. McCulloch did not consult me as his physician when he came to see me. At the time I saw him he was applying for reinstatement of lapsed insurance policies, maintaining he was in perfect health. I was consulted as a physician of the insurance company. Paid by the company. In this particular instance I was not paid by the insurance company. No I was paid by the applicant for reinstatement. I am under that impression because that was the usual custom at that time. At that time I was the physician regularly employed by the Penn Mutual Life Insurance Company, as examining physician. At the time I examined Mr. McCulloch he was in my office about 15 or 20 minutes or half an hour. I do not remember ever examining him at any other time as to his physical condition.

#### REDIRECT EXAMINATION

BY MR. KUNZEL.

I examined him for life insurance previous to that time, but not as to his physical condition from the standpoint of a patient. At the time he took out the Penn Mutual policies. That was in the fall of 1925. I gave him the ordinary life insurance examination. Aside from those, I made no other examination. Because of the history given me I made a careful examination of Mr. McCulloch's chest when he gave me the definite history of lobar pneumonia that he had in July 1926. My findings of that

(Testimony of Dr. Herbert Steff Anderton)

examination were negative, otherwise, I would not have recommended a reinstatement of his policies. I examined him in the fall of 1925 and again at the time of this examination for reinstatement.

BY MR. McKEE.

The X-ray plates which have been shown me show some fluid present. That condition frequently follows pneumonia, it is called pleurisy with effusion. It is also present in many cases of tuberculosis.

BY THE COURT.

Reading the X-ray plates he had fibrosis in the apices of both lungs with fluid in the base. Fibrosis condition indicates nature's protective measure in fighting T. B. We all have a certain amount of fibrosis in the chest. The fibrosis condition indicates that he had some irritation there at some time, not necessarily T. B. but possibly a T. B. in effect. As I read the plates, at that time it was inactive. Inactive means that it is not throwing off. There are two forms of T. B.—productive and non-productive. Productive T. B. we have in this fibrosis picture—in a productive T. B. we have a very poor looking picture where there is a throwing off of considerable exudate. In my judgment these pictures indicate a non-productive T. B. and a probable T. B. condition. His fibrosis is a protective measure against the breaking down of an active lesion. The fluid indicates irritation of the pleura. There are two forms of pleurisy, the dry pleurisy and pleurisy with effusion. In one the pleuretic walls become adherent and in the other they throw out the exudate and separate. These plates as far as the fluid is concerned indicate a pleurisy with effusion, which we very often get



(Testimony of Dr. Herbert Steff Anderton)

in an unresolved pneumonia. At the time these plates were taken I did not see any signs of an active T. B. there.

BY MR. McKEE.

I know Dr. Kinney. I employ him occasionally myself. I have no X-ray apparatus of my own. I employ several of the X-ray men. I don't think these plates indicate an active tuberculosis. It is difficult to say if they indicate any tuberculosis condition present owing to the fact I did not see the man with his clinical symptoms. In order to make a diagnosis, I would examine the plates in connection with the medical findings. I would attempt to diagnose an active T. B. without plates. I would not attempt to diagnose an active T. B. without clinical findings.

BY THE COURT. Dr. Anderton, I am showing you Dr. Kinney's form report from a reading of these plates. Tell me to what extent, if at all, you coincide with him without the aid of clinical examination? A Why, as far as the old fibroid t. b. is concerned, we can show an old fibroid t. b. in about 90% of the autopsies, of people.

The report shows some fibrosis, and finding of fluid in the right base. I found that and found many small points of calcareous density in the area. There is no essential difference in the opinion of Dr. Kinney and myself in the reading of these plates.

BY MR. KUNZEL.

From Exhibits 12 and 13 and having read Dr. Kinney's report I would say there was no active tuberculosis existing.



(Testimony of John D. Cornell)

JOHN D. CORNELL,

A WITNESS ON BEHALF OF THE DEFENDANT,  
TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. KUNZEL.

In 1927 I was County Detective. I live in San Diego. Have lived here forty years. I know the plaintiff, James McCulloch, jr. I met him the first time in 1927. I wrote some letters to him out of the District Attorney's office in 1927. I wrote in my official capacity. I searched through the files in 1930 to ascertain copies of the letters written to Mr. McCulloch. I found either one or two. The letter dated March 7th, 1927, is a copy of a letter I wrote to Mr. McCulloch. The letter dated March 16th, 1927, is a copy of a letter I wrote to Mr. McCulloch. I think these are all of the letters or copies of the letters that I wrote to Mr. McCulloch. (Letter dated March 7th, 1927, offered in evidence marked Defendant's Exhibit K, and letter dated March 16th, 1927, offered in evidence marked Defendant's Exhibit L, and received in evidence.) At the time I made search I also searched for other letters and found no other copies.

Defendant's Exhibit K, is as follows:

March 7th, 1927.

Mr. James McCulloch, Jr., care of McCulloch Hospital,  
914 Beech St., San Diego, California.

Dear Sir:

Please call at this office at your earliest convenience and ask for the undersigned.

Yours truly,

Stephen Cornell

District Attorney

By Chief Investigator.

(Testimony of John D. Cornell)

Defendant's Exhibit L is as follows:

Mr. James McCulloch, Jr.,  
Care of McCulloch Hospital  
914 Beech St.  
San Diego, California.

Dear Sir:

Under the date of March 7th, I wrote you asking that you call at this office.

We have had no response from you and unless a response is made to this office personally a warrant will be issued for your arrest. This communication is final, and trust that you will take advantage of the opportunity that is given you.

Yours very truly,

Stephen Cornell

District Attorney

By John D. Cornell,

Investigator.

The letters were written on account of some checks. The checks were given to nurses at the hospital for labor. The nurses had given me these checks.

#### CROSS EXAMINATION

BY MR. McKEE.

I don't know whether Mr. Peterson came to see me about a check or not. It is so long ago. I have seen the check represented by plaintiff's Exhibit 7. That is the check for \$300.00. That was lying on the desk with the other checks. I had that check with the other checks. Don Carrel brought it in. I asked Mr. McCulloch about the check and he told me he had given it to Mr. Carrell and it was post dated. I told Mr. Carrell there could be nothing done about it. I never had the check officially. I had it in my possession with the rest of the checks.

(Testimony of Mrs. Louise Barnett—Charles L. Randolph)

MRS. LOUISE BARNETT,

a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. KUNZEL.

I reside at 848 Beech Street, across the street from the McCulloch Hospital. I have been employed at the McCulloch Hospital a little over four years. I was first employed January 11, 1927. I resigned just a few days before the receiver took over the hospital. I resigned about the 27th or 28th of March 1927. I saw Mr. McCulloch around the hospital between January and March 1927. I cannot say how frequently. Not every day. I don't know whether it was every other day. He seemed to be in the office most of the time he was at the hospital. He would be up there more than once a week. It is hard to answer whether or not he was there two or three times a week. I used to see him in the office. The office was enclosed and I could not say whether he did any work or not. He had an office girl. I don't know whether he attended to business or not. I can't say. I think I saw him there half a day at a time. Just occasionally.

CHARLES L. RANDOLPH,

a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. KUNZEL:

I am in the life insurance business. I have an agency in San Diego. General Agent for the Penn Mutual Life Insurance Company of Philadelphia. Have been such for 30 years. I am acquainted with Mr. McCulloch. I be-

(Testimony of Charles L. Randolph)

lieve I have known him since 1925, in connection with his dealings with the office. I believe that is the date of his insurance. The books and records of the Company are kept under my supervision. I am familiar with the books to some extent, we have a cashier with us. We have a record of the payments of Mr. McCulloch of the policy of insurance that he took out No. 1196774. (Record introduced in evidence). Defendant's Exhibit M offered in evidence, ledger card, which is as follows:

“Name, James McCulloch, Jr., Net amount. Born, 12/6/93 Premium age 32, Net amount, \$15,000, Premium annual 4-1340 O. L. Accedali, beneficiary, Anna R., City of San Diego. Due 11/27/25, S. O. L. Agent D. C. Carrell. Premium date 11/27/25, Agency Hancock & Randolph, Relationship, wife. State California.”

The entries as to the amounts show, 19-25 and opposite that entry premium charges paid 2/28/27 \$185.40 1926 year, and under the heading of surplus \$84.30.

The entries in that card show the insured paid nothing, and after the note was passed then we couldn't collect it. The card does not indicate that he even had a note on it, but when we finally failed to get him to pay the premium, our company turned this over on the term insurance rate. We, of course, paid that ourselves after the assured did not pay. Term insurance is the actual cost of carrying insurance for death benefit only for a stipulated period of time. \$185.40 is the Company's charge. The \$84.80 is the surplus the assured would have been entitled to had he paid the premium. The charge of the Company is \$185.40. That is what I lost in the transaction. I am

(Testimony of Charles L. Randolph)  
the agent. As to policy No. 1196774 we accepted a memorandum note for the full amount of the first premium. We have a ledger card for policy No. 1196773. The entries on that card are identical with the other card except they differ in amount. That is the \$5,000 policy and the other is \$15,000. The term insurance charged to me is \$48.00. These two policies were issued at the same time. We received for payment on these two policies the note marked Plaintiff's Exhibit 5. Defendant's exhibits C and B mean a cancellation of the insurance in order that we may get out from the full annual premium. They bear date December 30th, 1926 and have reference to policies #1196774 and #1196773. We received a check from Mr. McCulloch when he attempted to be reinstated. He attempted to be reinstated Feb. 14th 1927, at that date we received a check, Plaintiff's Exhibit 7. The check was dated Feb. 24th. I did not attempt to collect that check. We presented the check to the bank for collection. Payment was not made on the check, it was a no good check. We received nothing on those two policies at any time. The term charge was paid by us. Mr. McCulloch paid nothing. The term charge was charged back to the agent. The term charge is the actual charge for insurance for death only. It provides no other, no commission. No waiver of premium for disability or commission. We have a ledger card for policy No. 1191014. The other two policies were never reinstated. We had a ledger card on the A policy. The record shows as to the payments on the A policy on December 12, 1925 he paid \$150. and on September 8, 1926 he paid \$156.60, plus \$74. interest paid. That constituted the first annual premium



(Testimony of Charles L. Randolph)

on that policy. He signed a note for the second annual premium, Plaintiff's Exhibit 6. That note was never paid to our office. We had to pay out the term insurance for the second year. It was \$42.98. Received no further payment of the premium on that policy except the note. At the time of the signing of the note policy surrender we invariably return the note. That is stated in the terms of the surrender. We received nothing on policy No. 1191014 after 1926, except the note. The notes were made payable to the Penn Mutual Life Insurance Co., of Philadelphia. Mr. Don Carrell was in our employ in 1926. He is now ill at his home. He is about as near dead as a man can be and still be alive.

#### CROSS EXAMINATION

BY MR. McKEE.

I do not recall whether I personally took these policies up from Mr. McCulloch. I have no recollection of every doing it. As far as I know I didn't take them up. I don't know whether they were taken up or not. I don't know whether I personally surrendered Exhibit 5 to Mr. McCulloch. I have no recollection about surrendering it. All I know is what the record shows. We received from Mr. Carrell the term charges, whatever that shows on policies B and C. We received \$185.40 on policy No. 1196774 and \$48 on policy No. 1196773. Part of the difference between the two amounts \$233.40 and \$339.39 was personal between Mr. McCulloch and Mr. Carrell. I don't know what that represents. (Letter, Plaintiff's Exhibit 14 for identification). That is part of the record of my files. The total amount of the term charge for which Mr. McCulloch gave his note to Mr. Carrell per-



(Testimony of Charles L. Randolph)

sonally was \$276.29, and there was an item of \$64.79, which I understood represented a check which he took up for Mr. McCulloch in order to prevent him from being criminally prosecuted and he included this in the note to Mr. Carrell. I cannot explain the different between the \$279 and the \$233.40. I have here a figure of \$339.39, (Exhibit No. 14 offered in evidence) and is as follows:

"4" which is B. "October 9th, 1929. Robert Dechert, V. P. & Counsel. C. L. Randolph & Son, General Agents.

"Replying to your wire of today, we endeavored, of course, to collect the premium on this insurance, but failing utterly, our agent, Don C. Carrell, called upon Mr. McCulloch at his office (we haven't the exact dates), and Mr. McCulloch said that he positively could not carry the insurance and would have to drop it. Mr. Carrell reminded him of his illness the previous year and told him that there was a possibility that he could not secure new insurance again, whereupon Mr. McCulloch told him that his doctors had released him pronouncing him cured and that he had no fear but that he could secure all the life insurance he desired. Therefore, note releases were signed and his premium notes delivered to him.

We were billed Feb. 21, 1927 for term insurance as follows:

- Policy No. 1196773, (which is C)	\$ 48.00
Policy No. 1196774, (which is B)	\$185.40
Policy No. 1191014, (which is A, in typewriting)	\$41.20
(and then the figures in pencil),	\$42.98.
Total (in typewriting) \$274.60 (and in pencil),	\$276.29.

This was paid by our agent, Don C. Carrell, and he has McCulloch's note for this amount, plus \$64.79, representing a check which McCulloch issued that was not good

(Testimony of Charles L. Randolph)

and which Mr. Carrell paid to save criminal action being brought against him. Total amount of the note which Mr. Carrell holds is \$339.39. McCulloch has not at any time paid one cent on it. The note, of course, is individual, and the Penn Mutual's name is not mentioned.

The insurance was voluntarily lapsed by Mr. McCulloch and he very readily signed note release. We do not see that he has a chance of sustaining an action. We received a letter from your Los Angeles attorneys today in which they stated that they would call upon us early next week. We are ready and willing and will be glad to do all we can to help defend the Penn Mutual against this unjust claim.

Very truly yours,

C. L. Randolph and Sons,  
General agents.  
per C. L. Randolph."

CLR-CVT.

The telegram is as follows:

"C. L. Randolph and Son,  
504 Union Bldg.,  
San Diego, Calif.

October 9, 1929.

Please write me at once detailed account of all events having to do with note policy surrender of policies eleven ninety six seven seventy three and four and eleven ninety one naught fourteen, James McCulloch, Jr. This should include a statement from Don C. Carrell, sub agent."

(Testimony of Charles L. Randolph)

I do not have a statement by Mr. Carrell in my files. He didn't make any statement. I embodied the substance of Mr. Carrell's early statement in the letter. I did not make any additional statement to this. Our record shows a charge for term insurance on policy A, No. 1191014, \$42.98. That was paid February 19, 1927 by our agency. Don Carrell paid it subsequent to that date. I do not know the date it was paid. My letter refers to when we paid it. The best information that I have before me was that it was in force for four months and four days. I cannot state from what date to what date the policy was in force. This term insurance was on the second year premium. That would be October 1926 to February 19th. There was \$56.20 surplus accrued on that policy the first year, but it was not available except on payment of second years premium. The policy was in force for four months and four days after its first anniversary date. The premium on the policy that was in force for four months and four days was paid by the term charge \$42.98. The \$48.00 and the \$185.40 paid the full year's insurance on that and the other one. It was the full year's insurance on both policies B and C. It shows that they were cancelled after the anniversary. Those were paid to me by Mr. Carrell. He was the agent in my office. I am reasonably familiar with these policies. There would be dividends on those policies assuming that they remained in force, he would be entitled not only to the benefits of the disability provisions of the policies, but the premiums having been paid or the waiver he would be entitled to the dividends. That is correct, but I cannot compute the exact amount at this time. I can only approximate it.

(Testimony of James McCulloch, Jr.)

MR. McCULLOCH RECALLED

BY MR. MONROE:

Mr. Carrell claimed that he took up that \$300 check; that is what he claimed when I gave him that note. No other check. There was no personal transaction between us and no debt outside of the insurance money. The note for \$339.39 was the amount due on the check and also surrendered that policy and he told me it was the difference between the \$300 and \$339 that was for short term insurance. The note marked "Paid in Full" of March 28th, was actually paid.

CROSS EXAMINATION

BY MR. GIRLING.

When he spoke about the note policy surrender there was something said to me about having to pay it himself. He told me the Company charged him with the insurance and I gave him the note. He claimed he took up the \$300 check and I felt the Company must have gotten the money. The check has never been cashed. Never cleared.

Dated: April....., 1932.

A. L. WISSBURG

WRIGHT & McKEE

By C M Monroe

Attorneys for Plaintiff

Service of the foregoing proposed statement of evidence and receipt of a copy thereof this 27 day of April, 1932, is hereby admitted and acknowledged.

O'Melveny, Tuller & Myers

And J. R. Girling

And L. M. Wright

Attorneys for Defendant

It is hereby stipulated and agreed that the above and foregoing statement of evidence is true and correct and may be approved by the judge without notice.

A. L. WISSBURG

WRIGHT & McKEE

By C M Monroe

Attorneys for Plaintiff and Appellant

O'MELVENY, TULLER & MYERS,

And J. R. Girling

And L. M. Wright

Attorneys for Defendant and Appellee

On this 28th day of April, 1932, the foregoing statement having been presented to me, the same is hereby in all things allowed and approved, and the same is hereby ordered filed as a statement of the evidence to be included in the record of appeal in the above styled and numbered cause as provided in paragraph (B) of Equity Rule 75.

John M. Killits

Judge.

[Endorsed]: Filed May 6 1932 R. S. Zimmerman,  
Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

## PETITION FOR APPEAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION:

JAMES McCULLOCH, JR., your petitioner, who is the plaintiff in the above entitled cause, prays that he may be permitted to take an appeal from the judgment entered in the above entitled cause on the 19th day of May, 1931, and from the order denying petition for rehearing thereafter entered on the 12th day of October, 1931, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith.

And your petitioner desires that said appeal shall operate as a supersedeas and therefore prays that an order be made fixing the amount of security which said plaintiff shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this Court be suspended and saved until the determination of said appeal by the Circuit Court.

Dated: December 26th, 1931.

A. L. Wissburg  
Wright & McKee  
by L. A. Wright  
D McKee  
C. M. Monroe

Attorneys for petitioner



ORDER ALLOWING APPEAL

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And now on the 28 day of December, 1931, on the presentation and consideration of the foregoing petition, IT IS ORDERED that said appeal be allowed as prayed for upon plaintiff's giving bond as required by law in the sum of 250 Dollars, and that bond for said sum submitted by plaintiff with said petition be and the same is hereby in all respects approved.

Curtis D. Wilbur

Circuit Judge

[Endorsed]: Received copy of the within document Jan 4 1932 O'Melveny, Tuller & Myers By (Invalid unless Countersigned) M. A. T. Filed Dec 26 1931 R. S. Zimmerman Clerk By Edmund L. Smith Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

ASSIGNMENT OF ERRORS.

Comes now the said JAMES McCULLOCH, JR., plaintiff in the above entitled cause, and files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioner for in said cause from the judgment of this Court entered on the 19th day of May 1931, and the Order denying Petition for Rehearing entered on the 12th day of October, 1931.

1. The Court erred in finding and adjudging that the evidence offered on behalf of the plaintiff did not establish that the plaintiff had become totally and permanently disabled as the term is defined in the policies of insurance

sued upon, during the time such policies were in force and particularly in that the undisputed evidence introduced by the plaintiff shows without substantial conflict that such disability occurred during such period.

2. The Court erred in finding and adjudging (Findings of Fact, Paragraph IV) "that it is not true that before the second anniversary date of said premium, and, to-wit: on July 31st, 1926, and before the sixtieth anniversary of the age of the insured, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit: pulmonary tuberculosis; that it is not true that plaintiff was compelled to remain confined to his home from July 31st, 1926, until April 9, 1927; that it is not true that plaintiff was confined to his bed and compelled to remain therein from April 9, 1927, to the latter part of August 1927. That it is not true that in consequence of said illness and disease plaintiff became and was permanently and totally disabled from engaging in any occupation whatsoever for remuneration or profit. That it is not true that said disease, independently from all other causes, and within the terms of said insurance, has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from July 31st, 1926, continuing to the date of filing of plaintiff's bill" in that the undisputed evidence shows without substantial conflict that the matters and things thus referred to in Paragraph IV of said Findings of Fact were true, and should have been so found by the Court.

3. The Court erred in finding and adjudging (Findings of Fact, Paragraph V) "That it is not true that the giving and accepting of said note continued said policy

No. 1191014 and the benefits thereunder, in force, to October 14th, 1927"—that such Finding amounts to a Conclusion of Law, and that the undisputed evidence shows, without substantial conflict, that the same was true and should have been so found by the Court.

4. The Court erred in finding and adjudging (Findings of Fact, paragraph V) "that it is true that said note was returned to plaintiff upon March 18th, 1927, and said policy of insurance cancelled" in that the undisputed evidence shows, without substantial conflict, that the same was not true, and should have been so found by the Court.

5. The Court erred in finding and adjudging (Findings of Fact, paragraph V) "That it is not true that at or about the same time (November 14, 1926) plaintiff, in payment of premiums on said two last mentioned policies of insurance (Nos. 1196773 and 1196774), made and delivered at the request of defendant's said agent in the City of San Diego, California, a post-dated check in the sum of \$300.00" in that the undisputed evidence shows without substantial conflict that the same was true, and should have been so found by the Court.

6. The Court erred in finding and adjudging (Findings of Fact, paragraph V) "That it is true that said policies of insurance lapsed for non-payment of premium on each policy on October 27, 1926, and were carried in force by defendant until November 28, 1926, the expiration of the grace period of each; that said policies, and each of them were surrendered by plaintiff as respects the benefits of each policy, upon December 30, 1926, and plaintiff's said note returned to him" That said Finding is a Conclusion of Law, and the undisputed evidence

shows, without substantial conflict, that the same was not true, and should not have been so found by the Court.

7. The Court erred in finding and adjudging (Findings of Fact paragraph V) "That it is not true that shortly after the date mentioned in said check, as its due date, or at any time, the general agent of the defendant Corporation in the City of San Diego California, threatened plaintiff with criminal prosecution for the issuance and non-payment of said check and delivered said check over to the District Attorney of the County of San Diego, California, for criminal action and prosecution thereon" That the undisputed evidence shows, without substantial conflict, that the same was true, and should have been so found by the Court.

8. The Court erred in finding and adjudging (Findings of Fact paragraph V) "That it is not true that plaintiff because of his said illness and disease, being unable to follow or engage in any occupation for remuneration or profit, was unable to pay said note and said check when due, respectively. .

That it is not true that defendant, by and through its general agent and representative in San Diego, California, wrongfully and fraudulently demanded that return and surrender of said policies of insurance #1196773 and 1196774 and/or policy #1191014, and/or threatened plaintiff with further, or any, criminal prosecution should he fail or refuse to so surrender said policies or insurance to defendant." in that the undisputed evidence shows without substantial conflict that the same was true, and should have been so found by the Court.

9. The Court erred in finding and adjudging (Findings of Fact par. V) "That it is true that upon March

18, 1927, plaintiff surrendered to defendant said policy No. 1191014 and executed a note policy surrender in respect to same; that at said time plaintiff received from defendant all notes given as premium for said policy." in that the undisputed evidence shows without substantial conflict that the same was not true, and the Court should have so found.

10. The Court erred in finding and adjudging (Findings of Fact par. VI) "That plaintiff was advised of his true condition, and the true and exact nature of his illness and disease prior to June 13, 1927. That it is not true that plaintiff was stricken with pulmonary tuberculosis on July 31, 1926, the date of his first confinement to his bed; that it is not true that because of fraud and duress practiced upon plaintiff and/or because plaintiff was not in possession of said policies of insurance, and/or in ignorance of the disability features therein mentioned that plaintiff was unaware of the requirements of the policy of insurance No. 1191014 relative to notice and proofs in the event of permanent and total disability until on or about April 10, 1929" That the undisputed evidence shows, without substantial conflict, that the same was true, and should have been so found by the Court.

11. The Court erred in finding and adjudging (Findings of Fact par. VII) "That no payments under said policy of insurance No. 1191014 were due to plaintiff in accordance with the terms and provisions of said policy of insurance" and "and that at said time, (March 26, 1929) said policy of insurance was no longer in force by reason of its having lapsed for non-payment of premiums and a note policy surrender of the same having been executed by plaintiff cancelling and surrendering all of



plaintiff's rights or benefits thereunder upon March 18, 1927". That the undisputed evidence shows, without substantial conflict, that the same was not true, and should have been so found by the Court. Also said Finding is a conclusion of law.

12. The Court erred in finding and adjudging (Finding of Fact par. Viii) "That it is true that said policy of insurance No. 1191014 lapsed by reason of non-payment by plaintiff of the premiums due thereon" That said proposed finding is a Conclusion of Law.

13. The Court erred in finding and adjudging (Findings of Fact par. XII) and the whole said paragraph, for the reasons assigned in Assignment of Errors, marked 2, hereof.

14. The Court erred in finding and adjudging (Findings of Fact XIII) "That it is true that said policy of insurance No. 1196774 lapsed for non-payment of premium upon October 27, 1926. . . . That it is true that said policy of insurance was surrendered by plaintiff on December 30, 1926, to defendant, at which time the note given by plaintiff as the first year's premium thereon was returned to plaintiff" for the reason that said proposed finding is a Conclusion of Law, and the further reason that the undisputed evidence shows, without substantial conflict, that the same was not true, and should have been so found by the Court.

15. The Court erred in finding and adjudging (Findings of Fact par. XIV) "That all the allegations contained in paragraph XIV of plaintiff's complaint are true, except that plaintiff was advised by his physician that he was suffering from tuberculosis prior to June 13, 1927; that it is not true that plaintiff had been suffering, or



was stricken with pulmonary tuberculosis on July 31, 1926; that it is not true that plaintiff had been prior to on or about April 10, 1927 suffering with pulmonary tuberculosis, or that he had been prior to April 10, 1927, totally and permanently disabled from engaging in any occupation for remuneration or profit; that it is not true that because plaintiff was not in possession of said policy of insurance, or because of fraud and duress practiced upon plaintiff by the defendant's agent and representative plaintiff was in ignorance and unaware of the requirements of said policy of insurance relative to notice and proof; that it is not true that plaintiff did not become aware that he was suffering from a disability until on or about April 10, 1929; that it is not true that the failure of plaintiff to have possession of the policy #1196774 was due to any fraud and/or duress practiced upon plaintiff by the defendant or any of its agents; that it is not true that plaintiff was in ignorance of the disability features mentioned or contained in said policy of insurance; that it is not true that plaintiff was not aware of the requirements of said policy of insurance relative to notice and proofs to be furnished to defendant in the event of total and permanent disability of plaintiff." for the reason that the undisputed evidence shows, without substantial conflict, that the same was true and should have been so found by the Court.

16. The Court erred in finding and adjudging (Findings of Fact par. XIV) "That it is not true that said policy of insurance, upon July 6, 1927, covered plaintiff, and would enable plaintiff to be entitled to the benefits mentioned and recited in said policy of insurance" for the reason that said proposed finding is a Conclusion of Law,

and for the further reason that the undisputed evidence shows, without substantial conflict, that the same was true and should have been so found by the Court.

17. The Court erred in finding and adjudging (Findings of Fact par. XIV) "That it is true that said policy of insurance was surrendered by plaintiff and a note policy surrender executed by plaintiff respecting the same upon December 30, 1926. That it is true that said policy of insurance by its terms lapsed for non-payment of premiums upon November 28, 1926" for the reason that the undisputed evidence shows, without substantial conflict, that the same was not true, and should have been so found by the Court.

18. The Court erred in finding and adjudging (Findings of Fact par. XV) "And that on said date, March 26, 1929, said policy of insurance #1196774 was not in force and effect for the reason that said policy of insurance had lapsed for non-payment of premiums and plaintiff, by the execution of a form of note policy surrender had, upon December 30, 1926, released and surrendered all his rights under said policy of insurance in consideration of the return to him of his unpaid promissory note in the principal sum of \$551.20, given by him on or about November 27, 1925, to defendant for premiums upon said policy of insurance, together with the policy of insurance #1196773" for the reason that said proposed finding is a Conclusion of Law and for the further reason that the undisputed evidence, without substantial conflict, shows that the same was not true, and should have been so found by the Court.

19. The Court erred in finding and adjudging (Findings of Fact. par. XVI) "that it is true that plaintiff

never submitted to defendant any claim in respect to disability under the provisions of said policy of insurance #1196774 while said policy of insurance was in force and/or effect" for the reason that said proposed finding is a Conclusion of Law, and that the undisputed evidence shows, without substantial conflict, that the same is not true, and should have been so found by the Court.

20. The Court erred in finding and adjudging (Findings of Fact par. XVIII) "except "that said promissory note in the sum of \$551.20 was tendered to defendant by plaintiff for the payment of premiums upon policies of insurance #1196773 and #1196774", for the reason that the evidence shows without substantial conflict that the same was true, and should have been so found by the Court.

21. The Court erred in finding and adjudging (Findings of Fact par. XX), and the whole of said paragraph, for the reasons assigned in Assignment of Errors, marked 2, hereof.

22. The Court erred in finding and adjudging (Findings of Fact par. XXI) "That none of the allegations contained in Paragraph XXI of plaintiff's complaint are true" for the reason that the evidence shows, without substantial conflict, that the allegations therein contained are true, and should have been so found by the Court.

23. The Court erred in finding and adjudging (Findings of Fact par. XXII) "except that plaintiff was not advised by his physician that he had tuberculosis on or about July 6, 1927, but as so advised prior to April 10, 1927; that it is not true that plaintiff was advised that he was stricken with pulmonary tuberculosis on July 31,

1926; that it is not true that plaintiff was stricken with tuberculosis on July 31, 1926; that it is not true that because of any fraud or duress practiced upon plaintiff by defendant's agent and/or representative plaintiff was unaware of the disability provisions in said policy of insurance and/or the requirements of said policy of insurance relative to notice and proof to be furnished defendant; that it is not true that plaintiff first knew the requirements of said policy of insurance relative to notice and proof in the event of total and permanent disability and/or was unaware of the disease and illness with which he was suffering until on or about April 10, 1929; that it is not true that the failure of plaintiff at any time to have possession of policy #1196773 was due to any fraud and/or duress practiced upon plaintiff by defendant or any of its agents" for the reason that *he* evidence shows, without substantial conflict, that the same was true and should have been so found by the Court.

24. The Court erred in finding and adjudging (Finding of Fact. par. XXIII) "except it is not true that said policy of insurance #1196773 was in full force and effect at the time plaintiff requested claim blanks from defendant for the purpose of filing his claim for total and permanent disability benefits on or about March 26, 1929. That it is true that policy #1196773 had lapsed for non-payment of premiums on November 28, 1926, and upon December 30, 1926, plaintiff had executed a note policy surrender surrendering each and all of the benefits under said policy in consideration of the return to him of his unpaid note for \$551.20 and the release of his liability under said note" for the reason that said purported find-

ings are Conclusions of Law, and the evidence shows, without substantial conflict that said policy of insurance was in full force at said time and had not lapsed for non-payment of premium.

25. The Court erred in finding and adjudging (Findings of Fact XXIV) "That none of the allegations contained in paragraph XXIV of plaintiff's complaint are true. That it is true the plaintiff did not submit any claim to defendant as respects the disability of plaintiff under the provisions of policy #1196773 while said policy was in force and/or effect" for the reason that said proposed finding is a Conclusion of Law.

26. The Court erred in finding and adjudging (Findings of Fact par. XXV) "That there was no sharp practice, fraud or deceit engaged in by the defendant in any way in December 1926, and in March 1927, when plaintiff surrendered to defendant his three policies of life insurance #1196773, #1196774 and #1191014, and gave and executed the several note policy surrenders respecting the said policies of insurance" for the reason that the evidence shows, without substantial conflict, that the same was true, and should have been so found by the Court.

27. The Court erred in finding and adjudging (Finding of Fact par. XXV) "That each of said surrenders definitely and permanently terminated any responsibility of defendant to plaintiff growing out of the several policies of insurance" for the reason that said purported finding is a Conclusion of Law, and does not find support in the evidence.

28. The Court erred in finding and adjudging (Finding of Fact par. XXV) "That that certain promissory



note in the sum of \$339.39 executed by plaintiff under date of April 19, 1927, and given to the defendant's agent, was executed as an individual monetary transaction between plaintiff and said agent, and in payment for moneys paid by said agent for the use of plaintiff" for the reason that the evidence shows, without substantial conflict, that the same is not true and should have been so found by the Court.

29. The Court erred in finding and adjudging (Finding of Fact XXVI) "That plaintiff was duly advised in the midsummer of 1927 as to his true physical condition; that plaintiff failed and neglected to present any claim to defendant until March 1929, and said delay on the part of plaintiff to proceed under the three insurance policies which he had surrendered to defendant's agent after default in the payment of premiums or premium notes was an unreasonable delay; that such delay in presentation of proofs or claims by plaintiff worked to the disadvantage of defendant because of the intervening disability of defendant's agent and principal witness, Carrell; and was such as to make plaintiff's respective claims as to his three demands for disability stale, and to establish the defense of laches interposed by defendant as to each of the three causes of action in plaintiff's complaint, independent of the mere length of time" for the reason that said purported finding is a Conclusion of Law, and for the further reason that the evidence shows, without substantial conflict, that the same was not true, and the Court should have so found.

30. The Court erred in finding and adjudging (Findings of Fact par. XXVII) "that on said respective dates,



August 10, 1927, and March 28, 1928, when plaintiff so made his aforesaid applications for disability benefits to Metropolitan Life Insurance Company and to Acacia Mutual Life Association, plaintiff has surrendered all benefits in and to policies of insurance #1196773, #1196774 and #1191014", for the reason that said purported finding is a Conclusion of Law, and for the further reason that the evidence shows, without substantial conflict, that the same was not true, and should have been so found by the Court.

31. The Court erred in finding and adjudging that the claim of plaintiff upon the insurance policies issued by the defendant was barred by laches, for the reason that the facts are established by the undisputed evidence produced at the trial that plaintiff failed to make demand for the disability benefits provided by the terms of said policies at the time he became totally permanently disabled, as such disability is therein defined, because of his ignorance of the existence of such total permanent disability, and the undisputed evidence further establishes that he acted promptly in making his demands upon defendant company immediately upon learning of his rights, and in the meantime the position of defendant company had not changed in any respect to its detriment by reason of the lapse of time.

32. The Court erred in holding and adjudging that said policies of insurance issued by defendant to plaintiff were canceled and terminated and therefore unenforceable, for the reason that the undisputed evidence establishes that the purported agreements of cancelation and surrender of said policies were entered into without considera-

tion and were made as a result of a mutual mistake of fact between the parties, in that at the time of said cancellation agreements the plaintiff had become permanently and totally disabled, as such disability is defined by the terms of said policies, and instead of premiums being due and payable to defendant company, as was then believed by both parties, in fact the premiums were waived by the terms of said policies by reason of plaintiff's disability, and the disability benefits provided by said policies were due and owing to the plaintiff from the defendant, and that at said time both plaintiff and defendant were ignorant of the existence of said total permanent disability and believed that the illness from which plaintiff was suffering was temporary in character.

33. The Court erred in rendering judgment against the plaintiff for costs.

34. The Court erred in denying plaintiff's Petition for Rehearing herein.

35. The Court erred in rendering judgment herein in favor of defendant and against the plaintiff.

WHEREFORE, plaintiff prays that said Judgment may be reversed, and for such other and further relief as the Court may deem meet and proper.

Dated: December 26th, 1931.

A. L. Wissburg  
Wright & McKee  
by L. A. Wright  
D. McKee  
C. M. Monroe

[Endorsed]: Received copy of the within document  
Jan 4 1932 O'Melveny, Tuller & Myers By (Invalid  
unless Countersigned) M. A. T. Filed Dec 26 1931 R. S.  
Zimmerman Clerk By Edmund L Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

SUPERSEDEAS AND COST BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, JAMES McCULLOCH, JR., as principal, and MARYLAND CASUALTY COMPANY, as surety, are held and firmly bound unto PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a corporation, in the full and just sum of TWO HUNDRED FIFTY AND no/100 Dollars, to be paid to the said defendant, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of January, 1932.

WHEREAS, lately at the January term of the United States District Court, in and for the Southern District of California, Southern Division, in a suit pending in said Court between James McCulloch, Jr., plaintiff, and said PennMutual Life Insurance Company of Philadelphia, a corporation, defendant, a judgment was rendered against the said plaintiff for costs, and the said plaintiff has petitioned for and been allowed by this Court an appeal to the United States Circuit Court of Appeals, and a citation has been directed to the said defendant citing it to appear in the United States Circuit Court at San Francisco, California, thirty (30) days from and after the date of such citation.

Now the condition of the above obligation is such that if the said James McCulloch Jr. shall prosecute said ap-

peal to effect, and answer all damages and costs if he fails to make good his plea, then the above obligation to be void, otherwise to remain in full force and effect.

James McCulloch Jr.

Principal

[Seal]

Maryland Casualty Company

Surety

By F. F. Edelen

(F. F. Edelen) Its Attorney-in-Fact.

APPROVED: San Francisco, California, January  
12, 1932.

Curtis D. Wilbur

Senior U. S. Circuit Judge.

STATE OF CALIFORNIA }  
County of San Diego } ss.

On this 11th day of January, 1932, before me, C. T. NEILL, a Notary Public, in and for the County of San Diego, State of California, residing therein, duly commissioned and sworn, personally appeared F. F. Edelen, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of MARYLAND CASUALTY COMPANY, the corporation that executed the within instrument, and acknowledged to me that he subscribed the name of MARYLAND CASUALTY COMPANY thereto as principal and his own name as attorney in fact. I further certify that said instrument was executed by said F. F. Edelen as attorney in fact of MARYLAND CASUALTY

COMPANY in my presence, and that his signature there-  
to is genuine.

WITNESS my hand and seal the day and year in this  
certificate first above written.

[Seal]

C. T. Neill

Notary Public in and for said County and State.

[Endorsed]: Filed Jan. 13, 1932. R. S. Zimmerman,  
Clerk, by Edmund L. Smith, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

STIPULATION RE CERTAIN EXHIBITS.

IT IS HEREBY STIPULATED AND AGREED  
by and between the parties to the above entitled action  
through their respective counsel that the Clerk of the  
above entitled court, in preparing the printed transcript  
of record on appeal in said cause, may omit insertion of  
X-rays and in lieu thereof certify to the Clerk of the  
Circuit Court of Appeals the originals of such X-rays.

Dated this 9th day of May, 1932.

Wright & McKee

Wright & McKee,

J. M. B.

Attorneys for Plaintiff.

J R Girling

O'Melveny, Tuller & Myers, & J R Girling

Attorneys for Defendant.

[Endorsed]: Filed May 9-1932 R. S. Zimmerman,  
Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

STIPULATION RE PRINTING OF TRANSCRIPT.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled action through their respective counsel that the Clerk of the above entitled court, in preparing the printed transcript of record on appeal, may omit the headings of all papers filed except the citation and the complaint, substituting in the place and stead thereof the phrase: "Title of Court and Cause," and that said Clerk may also omit all backs of documents except the filing endorsement.

Dated this 9th day of May, 1932.

Wright & McKee J M B.

Wright and McKee,

Attorneys for Plaintiff.

J R Girling

O'Melveny, Tuller & Myers, & J R Girling

Attorneys for Defendant.

[Endorsed]: Filed May 9-1932 R. S. Zimmerman,  
Clerk By Edmund L. Smith Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

PRAECIPE FOR TRANSCRIPT OF RECORD  
TO THE CLERK OF THE ABOVE COURT:

YOU ARE REQUESTED to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause and to include in such



transcript of record the following and no other papers or exhibits:

1. Complaint.
2. Answer of defendant.
3. Statement of the evidence, including the exhibits offered at the trial.
4. Judgment rendered by the trial Court.
5. Plaintiff's petition for rehearing.
6. Order denying petition for rehearing.
7. Petition for appeal and order allowing same.
- 7-A. Assignment of errors.
8. Citation on appeal.
9. This praecipe and service thereof.

Said transcript to be prepared as required by law and the rules of this Court and rules of the United States Circuit Court of Appeals for the Ninth Circuit and to be filed in the office of the Clerk of the Circuit Court in San Francisco, California, on or before the.....day of ....., 193...., (pursuant to the order of this Court enlarging and extending said time.)

Dated: June 2nd, 1932.

A. L. Wissburg  
 Wright & McKee  
 C. M. Monroe  
 Attorneys for appellant

Service of the above praecipe accepted and acknowledged this 4 day of June, 1932.

O'Melveny, Tuller & Myers  
 & J. R. Girling  
 By J. R. Girling  
 Attorneys for appellee

[Endorsed]: Filed Jun 7-1932 R. S. Zimmerman, Clerk. By Edmund L. Smith Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

## CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 253 pages, numbered from 1 to 253 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; answer; opinion; findings of fact and conclusions of law; decree; petition of plaintiff for rehearing and order to show cause; opinion on petition for rehearing; order denying motion for rehearing; agreed statement of evidence; petition for appeal and order allowing appeal; assignment of errors; supersedeas and cost bond; stipulation re certain exhibits; stipulation re printing of transcript and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$            and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this..... day of May in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-sixth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

